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THE
Law of Mortgage
AND OTHER
SECURITIES UPON PROPERTY

BY THE LATE
WILLIAM RICHARD FISHER
OF LINCOLN'S INN, BARRISTER-AT-LAW

SIXTH EDITION

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CANADIAN EDITION

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THE LAW OF MORTGAGE

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Law

PREFACE TO CANADIAN NOTES.

THE great reputation which Fisher's "Law of Mortgage" holds in all English-speaking countries has suggested the addition of Canadian Cases and Statutes to the present English Edition. Practically every case bearing on the subject decided by the Supreme Court and Provincial Courts will be found in the notes, and the Statute Law has been fully cited as well. There is a difficulty in assimilating English and Canadian law on such a subject as mortgage, owing to the difference in the land system of the two countries. Hence the Canadian Notes have been added at the end of chapters instead of adding them in the way of footnotes as I have done in Mr. Underhill's book on Torts and other works. In this way the English and Canadian law has been kept quite separate, and the student or practitioner will be enabled to find under each title or subdivision of the subject the laws of each country side by side. How far they agree or disagree, how far an English case may help to solve a question of Canadian law, must be the work to a large extent of the reader. My work has been to place the authorities and statute law of the two countries before him, and help by that classification the more easy solving of difficulties arising in practice.

A. C. FORSTER BOULTON.

5, KING'S BENCH WALK TEMPLE,
October, 1910.

PREFACE TO THE SIXTH EDITION.

THE object of the Author of this Work (as stated in the Preface to the Fourth Edition) was "to explain the nature of the different kinds of securities, the rights and remedies of the persons who make, and of those who are entitled to the benefit of them, and the manner of and circumstances attending their discharge." That this object was a wide one, presenting many difficulties in its execution, is obvious; "for none of the several kinds of securities involve precisely the same rights and remedies, while from their diversity of origin, their separate and gradual adaptation to the convenience of borrowers and lenders and the exigencies of commerce, and the nature of the different kinds of property which they affect, they probably embrace a greater variety of learning than any other single branch of the English law." As, however, Mr. Fisher observes: "Considering the extent of the law of securities, the number of the sources from which it is drawn, and that it has grown up under jurisdictions proceeding upon different principles, there is more harmony in the general results than might have been expected. The greatest difficulties occur in the law relating to priority, and arise partly from the passing of numerous statutes with little or no regard to their effect upon one another, and partly from the exceptions and refinements which have been grafted upon the rules relating to the doctrines of Fraud and Notice, and to the Tacking and Consolidation of securities."

Mr. Fisher's work has long been recognized by judges and practitioners as a monument of care and learning,

and is freely quoted in the Courts as an authority. The present Editors have therefore abstained so far as possible from altering Mr. Fisher's language, except where modern cases or statutes have rendered alterations and additions inevitable. The sections dealing with Mortgage Debentures, Mortgages of Choses in Action, and Mortgages by Tenants for Life and other Limited Owners, and Mortgages under the Land Transfer Acts, found no place in Mr. Fisher's work, and the present Editors are therefore solely responsible for them. Owing also to the numerous decisions on the Bills of Sale Acts since Mr. Fisher's death, the section on that subject was practically re-written in the last edition.

The present edition contains (in the body of the work) all cases and statutes bearing on the subject since the last edition, including cases reported in the August 1910 numbers of the Law Reports, and the 1910 statutes passed up to that date; and (in the Addenda) the cases reported in the September and October numbers of the Law Reports.

The table of cases and contemporaneous references has been thoroughly revised and brought up to date by Mr. Underhill's clerk, Mr. Woolgar, whose great care the present Editors desire to acknowledge.

Lastly, it is hoped and believed that this edition will be found to be accurate and trustworthy; but if the present Editors should be caught tripping, they must trust that some indulgence may be shown, having regard to the labour and difficulty inseparable from the editing of a work such as this.

A. U.

A. C.

LINCOLNS INN,
October, 1910.

The Law of

MORTGAGE AND OTHER SECURITIES

UPON PROPERTY.

PART I.

OF SECURITIES UPON PROPERTY GENERALLY.

PARAGRAPH

<i>Of the several kinds of securities upon property</i>	..	..	..	..	..	..	..	1
<i>Mortgages</i>	..	..	..	..	..	..	..	2
<i>Pledges or pawns</i>	..	..	..	..	..	..	..	3
<i>Hypothecations</i>	..	..	..	..	..	..	..	4
<i>Liens</i>	..	..	..	..	..	..	..	5

1. A security upon real or personal property for the payment of a debt, or the performance of an engagement, may be created by contract, or may arise by operation of law. In the former case, the security takes the form of MORTGAGE, PLEDGE, or HYPOTHECATION; in the latter it is called a LIEN.

Of the several kinds of securities and the incidents common to all of them.

To each of these kinds of security is incident :—

1. A right in the creditor to make the property which is subject to the security answerable for the debt or engagement ;
2. A right in the debtor (called the equity of redemption) to redeem the property by paying the debt, or performing the engagement, any attempt to fetter which right is void (a) ;
3. A liability on the part of the creditor, upon such payment or performance, to restore the property to the owner.

2. A mortgage is a form of security created by contract, conferring an interest in property, defeasible (*i.e.*, annullable) upon

Securities created by

(a) *Secretary of State for India v. British Empire Mutual Life Assurance Co.*, 67 L. T. 434 ; *Salt v. Marquis of Northampton*, [1892] A. C. 1 ; *Samuel v. Jarrah Timber, etc., Corporation*, [1904] A. C. 323.

Paragraphs
2—5

mortgage
legal or
equitable.

performing the condition of paying a given sum of money, with or without interest, or of performing some other condition (*a*). In formal mortgages it is usual ostensibly to limit the right of redemption to a specified period, but Courts of Equity have (as hereafter stated) for centuries refused to recognize any such limitation. A mortgage may be either legal or equitable. In the former case the legal ownership of the property is transferred to the mortgagee; in the latter the legal ownership remains vested in the mortgagor, or in some other person than the mortgagee (*ex. gr.*, a trustee or a prior mortgagee), and the security can consequently only be enforced under the equitable jurisdiction of the court, which carries it into effect either by giving the creditor immediately the appropriate remedies, or by compelling the debtor to execute a security in accordance with the contract.

Pledges.

3. A pledge or pawn is a security which is created by the bailment of a personal chattel, to be kept till the debt is discharged (*b*). It is incomplete without actual or constructive delivery of the goods to the pledgee (*c*).

Hypothecations.

4. An hypothecation is the appropriation of property for the discharge of a debt or engagement, without giving the creditor either an absolute or special property in the subject of the security; *ex. gr.*, a charge contained in a settlement, or an order upon a third party to apply moneys in his hands to the discharge of the debt.

Liens.

5. A lien, answering to the *tacita hypotheca* of the Civil Law, is a right conferred by law, and not by contract, upon one man to retain possession of or to have a charge upon property real or personal belonging to another, until certain demands are satisfied (*d*). In some works the word lien is used to include not only liens arising by operation of law, but also charges or hypothecations arising out of contract; as where one agrees to give another a "lien" on property. In this work, however, the word "lien" is exclusively used to designate securities arising otherwise than by contract.

(*a*) See Wharton's Law Lex., title "MORTGAGE." See also a definition of mortgage by Lindley, M.R., in *Santley v. Wilde*, [1899] 2 Ch. 474.

(*b*) Wharton's Law Lex., title "PAWN."

(*c*) *Infra*.

(*d*) See Wharton's Law Lex., title "LIEN."

PART II.

OF SECURITIES BY CONTRACT.

CHAPTER	PARAGRAPH
I.—OF MORTGAGES GENERALLY :	
SECTION I.—Legal mortgages, including Welsh mortgage	6—23
,, II.—Equitable mortgages	24—38
II.—OF MORTGAGES OF LANDS :	
SECTION I.—Of the modes of creating mortgages of freehold, copyhold, and leasehold land	39—50
,, II.—Of the necessity in certain cases of registering mortgages of land	51—53
,, III.—Of the modes of creating mortgages of freehold and leasehold land, the title to which is registered under the Land Transfer Acts	54—61
III.—OF MORTGAGES OF CHATTELS PERSONAL AND FIXTURES :	
SECTION I.—Of mortgages of chattels personal and fixtures generally	62—73
,, II.—Of the effect of the Bills of Sale Act on securities on chattels personal and trade machinery	74—123
,, III.—Of the effect of the order and disposition clause in the Bankruptcy Act	124—132
IV.—OF MORTGAGES OF SHIPS	133—148
V.—OF MORTGAGES OF CHOSSES IN ACTION	149—165
VI.—OF MORTGAGE DEBENTURES	166—183
VII.—OF TRANSFER OF MORTGAGES	184—191
VIII.—OF PAWNS OR PLEDGES :	
SECTION I.—Ordinary pledges	192—204
,, II.—Pledges under the Pawnbrokers Act	205—214
IX.—OF HYPOTHECATIONS	
SECTION I.—Ordinary hypothecations	215—216
,, II.—Of equitable assignments	217—224
,, III.—Maritime hypothecations	225—234
,,	235—264
X.—OF SECURITIES MADE UNDER STATUTORY OR OTHER POWERS :	
SECTION I.—Of securities made under powers generally	265—274
,, II.—Of securities made by corporations, including incorporated companies	275—296
,, III.—Of securities made by building and friendly societies	297—298
,, IV.—Of securities by married women	299—312

CHAPTER	PARAGRAPH
SECTION V.—Of securities upon the property of infants	313—315
„ VI.—Of securities upon the property of lunatics	316—320
„ VII.—Of securities by tenants for life and other limited owners	321—349
X.—OF SECURITIES MADE UNDER STATUTORY OR OTHER POWERS :— <i>continued</i>	
SECTION VIII.—Of securities upon ecclesiastical benefices	350—358
„ IX.—Of securities by private trustees, executors, trustees in bankruptcy, and charitable trustees	359—379
„ X.—Of securities by agents	380—404
„ XI.—Of securities by buyers and sellers under Factors Act, 1889	405—407
XI.—OF VOID OR IMPERFECT SECURITIES	408
SECTION I.—Of securities void as against third parties	409—428
„ II.—Of securities obtained by misrepresentation, extortion, or undue influence ..	429—442
„ III.—Of securities which are affected by the nature of the consideration	443—452
„ IV.—Of securities which are affected by the nature of the security	453—465

CHAPTER I.

Of Mortgages Generally, including Welsh Mortgages.

Section I.—Legal Mortgages.

,, II.—Equitable Mortgages.

SECTION I.

Legal Mortgages.

	PARAGRAPH	Paragraph
<i>Division of mortgages</i>	6	6
<i>Definition of legal mortgage</i>	7	
<i>Contract for payment implied</i>	8	
<i>Implied covenants in statutory and other mortgages under Conveyancing Act</i>	9	
<i>Welsh mortgages</i>	10-12	
<i>Omission of covenant may be of some evidence that instrument is not a mortgage at all</i>	13	
<i>Instrument construed as mortgage if that was true intent of parties whatever its form may be</i>	14	
<i>Effect of concealed separate defeasance</i>	15	
<i>Mortgages by way of trust for sale</i>	16	
<i>Secret mortgages not delivered to creditor</i>	17	
<i>Defeasible conveyances not necessarily mortgages</i>	18	
<i>Defeasible purchase of equity of redemption</i>	19	
<i>Considerations determining whether instrument is a mortgage or not</i> ..	20	
<i>Conditions in settlement for cesser on payment of money</i>	21	
<i>No redemption or foreclosure in case of mere conditional sales</i>	22	
<i>Grants of annuities with right of repurchase</i>	23	

6. A mortgage may be *legal* or *equitable*, and a legal mortgage may be a mortgage proper (*mortuum vadium*) (a), or a Welsh mortgage (*vivum vadium*). Different kinds of mortgages.

(a) Ancient authorities disagree as to the reason why the word *mortuum* was applied to distinguish a particular form of the *vadium* or pledge. According to GLANVILLE, a pledge is called *mortgage*, when the fruits or rents received do not tend to reduce the demand. (Lib. 10, c. 6.) And again, he says (c. 8), when an immovable thing is put in pledge, and seisin of it has been delivered to the creditor for a definite term, it has either been agreed between the creditor and debtor that the rents shall in the mean time reduce the debt, or that they shall not be so applied. The former agreement is just and binding; the other, unjust and dishonest, and is that called a *mortgage*. But LITTLETON (s. 332), after describing the *mortuum vadium* as a feoffment, upon condition that if the feoffor pay the

Paragraph
7
Definition of
legal
mortgage.

7. A legal mortgage (proper) is an assurance of the whole or part of the estate or interest of the debtor in real or personal property of which he is the legal owner or of some legal estate or interest which he has power to transfer in such property. It is commonly in form an absolute assurance, but is (in the older forms) subject to a condition, that upon payment of the debt at a certain time the assurance shall be void: or (as is now the almost universal practice) to a proviso that in the same event the property shall be reconveyed. In either case the essence of a legal mortgage is the vesting of the legal estate in the mortgagee, together with the right of possession,

money to the feoffee at a certain day, the feoffer may re-enter, says, it is called *mortgage*, for that it is doubtful whether the feoffor will pay at the day limited; and if he doth not pay, then the land is taken from him for ever, and so dead to him upon condition, &c.; and if he doth pay, then the pledge is dead as to the tenant in mortgage. To which Lord COKE adds the further reason, that it is to distinguish it from *vivum vadium*: so called, because if one pledge an estate until the pledgee have received the debt out of the profits of the land, neither money nor land dieth or is lost. With which definition agrees that of Lord ELDON (see *Fenwick v. Reed*, 1 Mer. at p. 124) and of the French writer LAURIERE; who also shows how much the ecclesiastical jealousy of usury had to do with the origin of these different forms of security; and how in each country creditors adopted similar devices for getting the advantage of their debtors.

"When creditors," says LAURIERE, "intimidated by ecclesiastical censures, took lands in pledge, with an agreement that the profits should reduce the principal, this pledge was called *vif*, because, as our old practitioners say, it discharged itself by its own produce, which was very just and lawful. But when the creditor took or received the profits in pure gain to himself and in pure loss to the unhappy debtor, it was called *mort-gage*, or *gage-mort*, because it did not discharge or free itself. And this *mort-gage* was allowed only in a few cases in which it was just to admit it; as where a father, marrying his daughter, and giving her a portion, which he was unable to pay in ready money, gave an estate in pledge to his son-in-law, to receive the rents till the portion should be paid; or a vassal borrowed money of his feudal lord, and gave his fief in pledge; because, as the lord so long as the pledge lasted, lost the services of the vassal, it was right he should be indemnified by having the profits of the pledged fief."

"As, except in these two cases, mortgages were odious, the usurers disguised them by buying their debtors' estates, with a right of repurchase, for a certain number of years; but upon examination of these new contracts the theologians and canonists decided that they were fictitious, usurious, and true antichriseses, when the sale was made at an undervalue, where there was a right of revocation or an equivalent agreement, and when the buyer was suspected of usury."

(Texte des Coutumes de la Préôvté et Vicomté de Paris.)

The *mortuum vadium* of GLANVILLE seems to have been in fact the *vivum vadium* of COKE and LAURIERE, which corresponds with the Welsh mortgage and the *pactum antichriseseo* of the Roman law (Colquhoun, R. C. L. § 1497). We may perhaps infer from an Anglo-Saxon deed of the tenth century, that a security resembling the ancient *mortuum vadium*, and possibly derived from the *pactum antichriseseo*, was used in England at that time. It appears from this document that land was delivered by Sigelm, the father of Eadgifa, queen of Eadward the elder, in pledge for 30% to Goda, who held it for seven years. Sigelm having paid off the debt, and bequeathed the land to Eadgifa, was afterwards slain in battle, and Goda then denied having received the money, and for six years withheld the land. Eadgifa purged her father by oath as to the payment, but could not recover the land without the interference of the reigning king; and after being again despoiled of it, and a second time regaining it, she bestowed it upon the Church. (See Lye's Anglo-Sax. Dict. vol. 2, Appendix, No. 4, ed. 1772.) Assuming the authenticity of this document, it shows that possession of the land was delivered, and that the right of redemption was admitted after seven years; and it seems to be implied that no reduction of the debt had taken place by reason of the mortgagee's possession. In *Domesday*, the mention of lands in mortgage seems to imply the possession of the mortgagee (see *Domesday* for Essex, fols. 157, 158, 167); and if, as is possible, the alleged mortgages were only pretences to cover acts of spoliation against the former owners, it is still more clear that the possession of the mortgagee

even though it contain a covenant for quiet enjoyment *after default* (a). *Paragraphs 7—8*
 On payment of the debt at the time fixed, the mortgagor may re-enter (in the case of a condition); or (in the case of a proviso) will be entitled to a reconveyance. Before the recognition of equitable rights in common law courts, effected by the Judicature Act, 1873, the estate of the mortgagee became absolute and irredeemable at law, upon nonpayment (b), but was subject in courts of equity to a right called the EQUITY OF REDEMPTION, which arose from the consideration that the real object of the transaction was the creation of a security for the debt (c). And although all branches of the High Court now recognize this right, it still remains an equitable interest only, the legal estate being considered as vested in the mortgagee. Any attempted restriction on this equity of redemption beyond certain narrow limits is void (d); but by means of an action in the Chancery Division it may, under certain conditions, be barred, or as it is technically termed, “foreclosed.”

8. It is usual in a mortgage to insert a covenant to repay the principal sum, with interest, on the day fixed for payment, and also to pay interest after default so long as the security shall subsist. But these were never necessary parts of a mortgage, which implies a loan, and therefore (except in the case of a Welsh mortgage) a debt recoverable by action (e), and bearing interest, even if none be expressly reserved (f). In the absence of a covenant or bond, the debt is, however, only a simple contract debt (g).

was then incidental to the security; as it was also in the time of GLANVILLE, when there could be no conveyance without livery of seisin.

The antichrèse of the Code Napoléon appears to partake of the nature both of the old *mortuum vadum* and of the *vivum vadum*. By it the creditor acquires a right over the enjoyment only of the estate, which, however, he may retain until payment of his whole debt. He must apply the profits annually in discharge of the interest first, and then of the principal of the debt, and is bound to account. In the absence of special agreement he pays the outgoings of the property, which it is also his duty to keep in repair, deducting these expenses from the produce. It seems that the extent to which the debt is to be discharged by the produce, and the manner of paying it, may be the subject of particular agreement, but no agreement is permitted which will give the mortgagee an absolute interest in, or a right to sell the estate, on default of payment at the appointed day, or otherwise than by the regular legal process. (Code Civil, §§ 2085—2091.)

(a) *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553.

(b) *Co. Litt.* 205 a, note 1; *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553.

(c) *Sparrow v. Hardcastle*, 3 Atk. at p. 805, per Lord HARDWICKE; *Seton v. Slade*, 7 Ves. 265, per Lord ELDON.

(d) *Field v. Hopkins*, 44 Ch. D. 524; *Salt v. Marquis of Northampton*, [1892] A. C. 1, where a proviso that in the event of the death of the mortgagor the whole of certain policy money should go to the mortgagee absolutely was held void. *Noakes & Co. v. Rice*, [1902] A. C. 24; *Samuel v. Jarrals Timber, etc., Corporation*, [1904] A. C. 323, but conf. *Davies v. Chamberlain*, 26 T. L. R. 138.

(e) *Yates v. Aston*, 4 Q. B. 182.

(f) *Anon.*, 4 Taunt. 876. So of a bond: *Farquhar v. Morris*, 7 T. R. 124.

(g) Per Lord THURLOW, *Ancaster v. Mayer*, 1 Bro. C. C. at p. 464; *Quarrell v. Beckford*, 1 Mad. at p. 278.

Paragraphs
9—11

Implied
covenants in
statutory
and other
mortgages
under Con-
veyancing
and Law of
Property
Act.

9. Under the Conveyancing and Law of Property Act, 1881, c. 41, s. 26, a mortgage of *freehold* or *leasehold* land, *if it be expressed to be by way of statutory mortgage* and be made in the form given in Part I. of the third schedule to the Act, with necessary additions and variations, implies both a *covenant* by the mortgagor for payment of principal and interest at the stated rate, and a proviso for reconveyance by the mortgagee, upon payment on the stated day of principal and interest; the word “mortgagor” including all persons deriving title under the original mortgagor or entitled to redeem, and the word “mortgagee” all persons deriving title under the original mortgagee (*h*). By s. 28, where there are several mortgagors or covenantors, the implied covenant is joint and several, and where there are several mortgagees or transferees the implied covenant is with them jointly, unless the money is secured to them in shares or distinct sums, in which case it is a covenant with each mortgagee severally, in respect of his share or distinct sum.

By s. 7 (1) (C), (D) of the same Act, *every* mortgage (whether it be a statutory mortgage or not) by a person expressed to convey as beneficial owner, implies absolute covenants for title to the effect stated in that section.

Welsh
mortgages.

10. A Welsh mortgage, which is now very rare, is an assurance by which property is conveyed to the creditor, without any condition, for payment, and of which receipt of the rents and profits by the mortgagee, either until payment of interest and principal, or in lieu of interest only, are necessary incidents (*i*). Being without condition there can be no forfeiture, and consequently there is no *equity* of redemption which can be the subject of foreclosure (*k*). There is, however, a continuing right of redemption, every receipt of rent being under the contract applied in discharge of the interest on the money secured, and then in some cases towards repayment of principal (*l*); and this right only ceases on the expiration of the statutory period of limitation, which period does not commence until after satisfaction of the mortgage (*m*). In this particular it seems that the modern Statutes of Limitation have made no difference (1405).

Welsh
mortgage
does not
imply a

11. A Welsh mortgage implies a debt for the purpose of adjusting such equities as may exist between the real and personal estates of the mortgagor (*a*); but not (in the absence of express covenant) so

(*h*) Sect. 2 (vi.).

(*i*) *Balfe v. Lord*, 2 Dru. & War. 480; *Orde v. Heming*, 1 Vern. 418; *Yates v. Hambly*, 2 Atk. 360; *Longuet v. Scawen*, 1 Ves. Sen. 402; *Fenwick v. Reed*, 1 Mer. 125.

(*k*) *Balfe v. Lord*, *supra*; *Bonham v. Newcomb*, 1 Vern. 232.

(*l*) For form of order applicable to a Welsh mortgage, see *Yates v. Hambly*, *supra*, and *Douglas v. Culverwell*, 4 De G. F. & J. 20.

(*m*) *Yates v. Hambly*, *supra*; *Orde v. Heming*, *supra*; *Fenwick v. Reed*, *supra*.

(*a*) Per Lord TALBOT, *King v. King*, 3 P. Wms. at p. 361.

as to give a right of action for the debt, as this would be contrary to the agreement between the parties (b). For the same reason, although the provision in the Conveyancing and Law of Property Act, 1881, c. 41, s. 2, that a mortgage shall include a charge, may make the Act applicable for some purposes to a Welsh mortgage, notwithstanding that it is of the nature of *vivum vadium*, it is considered that the ordinary provisions of a Welsh mortgage, and particularly the continuing right of redemption which it carries, would be a sufficient expression of intention that the power of sale given by the Act to a mortgagee should not apply to such an instrument.

Paragraphs
11—14

personal
covenant to
pay principal
or interest.

12. Although in an ordinary Welsh mortgage, there is usually no covenant for payment, yet the existence of an express covenant to pay the principal and interest on demand is not (c) inconsistent with a provision that the mortgagee shall hold until payment, nor does it affect such a provision so as to lead to forfeiture, and to let in foreclosure. But if there be such a *covenant*, and no stipulation for the receipt of the rents and profits by the grantee, the security will not have the character of a Welsh mortgage, the presence of the stipulation and the absence of a *condition* (as distinguished from a personal covenant) being alike necessary to every form of that security (d). And unless the terms of the instrument exclude such a construction, the presumption will be that the deed was meant to operate as an ordinary mortgage. This presumption will be strengthened if the debt be also secured by bond and judgment; for it would be absurd to suppose that any other property of the debtor should be liable to be taken for the debt, and not the estate which was specifically pledged for its payment.

Absence of a
condition for
redemption
essential to a
Welsh
mortgage.

13. Although, as we have seen, the covenant for payment of the debt is not a necessary part of a common mortgage, its absence may afford some evidence (in a doubtful case) that the transaction was not a mortgage at all, but a conditional purchase (e).

Omission of
covenant for
payment may
be evidence
that
instrument
not intended
to be security
for a debt.

14. But while the courts protect a *bona fide* purchaser, and will not lightly infer an intention to make a mere security, if none be expressed (f), they will give effect to an intention, if proved, to create a security, and will also take care that a borrower shall not

Equity looks
at the real
intention of

(b) *Cassidy v. Cassidy*, 24 L. R. Ir. 577.

(c) *Teulon v. Curtis*, Younge, 610. See *S. C.*, sub nom. *Curtis v. Holcombe*, on suit for redemption, 6 L. J. (N.S.) Ch. 156.

(d) *Balfe v. Lord*, 2 Dru. & War. 480. In *O'Connell v. Cummins* (2 Ir. Eq. Rep. 251), a demurrer was allowed to the mortgagee's bill, the proviso for redemption being for payment at any time: which was considered to be of the nature of a Welsh mortgage.

(e) *Mellor v. Lees*, 2 Atk. 494; *Floyer v. Lavington*, 1 P. Wms. 268; *Goodman v. Grierson*, 2 Ba. & Be. 278. And see *Taylor v. Emerson*, 4 Dru. & War. 117; *Holmes v. Mathews*, 3 Eq. Rep. 450.

(f) *Cotterell v. Purchase*, For. 61.

Paragraphs suffer from the omission by fraud, mistake, or accident, of the usual
 14—15 requisites of a mortgage.

the parties, An instrument which purports to be an absolute conveyance,
 and if a mortgage may therefore be construed as a mortgage, where, according to the
 was intended true intention of the parties, it was intended to be regarded as a
 will give mortgage (*g*)—
 effect to that intention.

Parol evidence of mistake or fraud. (1.) If there be evidence of the non-execution, erasure, or omission
 by mistake or fraud, of an intended defeasance or proviso
 for redemption (*h*); and the Statute of Frauds will not be
 allowed to be pleaded to cover what would amount to a
 fraud, unless perhaps the parties deliberately abstained
 from putting their meaning in writing (*i*).

Collateral defeasance. (2.) If a separate defeasance or agreement for a right of redemption
 has been made by the mortgagee or his duly-authorized
 agent, either in writing or verbally (*k*).

Mortgage inferred from conduct. (3.) If it appear from recitals in, or by inferences drawn from, the
 contents of other instruments, or from the payment of
 interest or other circumstances, that the conveyance was
 intended to be redeemable (*l*). But the mere existence, in
 a deed not executed by the grantee, of a recital that a
 former absolute conveyance to him was intended to take
 effect as a mortgage, will not give a right of redemption
 after the lapse of many years and the death of the grantee,
 although the deed has been in his possession and he held
 other property by virtue of it (*m*).

Effect of concealed separate defeasance on purchases for value. **15.** If an absolute conveyance be made with a separate defeasance,
 in order, by concealing the defeasance, to commit a fraud, the
 defeasance will be void as against an absolute purchaser who had
 no notice of the fraud (*a*). And if a mortgage have been fraudulently
 made to appear as an absolute conveyance it will not be corrected
 at the instance of those concerned in the fraud (*b*).

(*g*) *Re Duke of Marlborough, Davis v. Whitehead*, [1894] 2 Ch. 133; *re Watson, Exp. Official Receiver in Bankruptcy*, 25 Q. B. D. 27.

(*h*) *Anon.*, cited in *Maxwell v. Mountacute*, Pre. Ch. 526; *England v. Codrington*, 1 Eden, 169; *Att.-Gen. v. Crofts*, 4 Bro. P. C. 136; *Card v. Jaffray*, 2 Sch. & Lef. 374.

(*i*) *Re Duke of Marlborough, Davis v. Whitehead, supra*, distinguishing and commenting on *Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro. C. C. 219; *Dixon v. Parker*, 2 Ves. Sen. 219, *per* Lord HARDWICKE; *Lincoln v. Wright*, 4 De G. & J. 16.

(*k*) *Francklyn v. Fern*, Barn. Ch. 30; *Clench v. Witherley*, Cas. t. Finch, 376; *Manlove v. Bale*, 2 Vern. 84; *Whitfield v. Parfitt*, 4 De G. & Sm. 240; *Lincoln v. Wright*, 4 De G. & J. 16.

(*l*) *Maxwell v. Mountacute*, Pre. Ch. 526; *Cripps v. Jee*, 4 Bro. C. C. 472; *Sevier v. Greenway*, 19 Ves. 413; *Allenby v. Dalton*, 5 L. J. (o.s.) K. B. 312; *Barton v. Bank of New South Wales*, 15 App. Cas. 379.

(*m*) *Tull v. Owen*, 4 Y. & C. 192.

(*a*) *Webber v. Farmer*, 4 Bro. P. C. 170.

(*b*) *Baldwin v. Cawthorne*, 19 Ves. 166.

16. An instrument in the form of a trust for sale in case of non-payment of the debt at a certain time, is in effect a mortgage, and redeemable by the grantor as such ; the remedy of the mortgagee being under the trust for sale, instead of by foreclosure on default in payment, as in the case of an ordinary mortgage (c).

Paragraphs
16—18

Mortgages
by way of
trust for sale.

17. A mortgage may be created by a deed duly executed, though it be retained by the debtor without communication with the creditor, unless it be shown that there was fraud in the execution, or that it was delivered as an escrow, and intended to operate conditionally (d).

Secret
mortgages
not delivered
to creditor.

18. Although in certain cases conveyances, apparently absolute, may be construed as mortgages, an absolute conveyance with an agreement for repurchase, or that the conveyance shall be void upon payment of a certain sum at a fixed time, will create a mere right of repurchase to be exercised according to the strict terms of the power, and not such a right of redemption as is incidental to a mortgage (e) ; unless it be proved that the transaction was in the nature of a mortgage security, and that the grantor and grantee were intended to have mutual and reciprocal rights to insist upon reconveyance of the estate and repayment of the consideration (f). In the case of a mortgage, the penalty or forfeiture is introduced for the purpose of security only, and, in case of default in payment at the appointed time, the mortgagee is compensated by receiving interest. But in the case of a defeasible purchase, forfeiture is out of the question, the estate being absolutely vested in the grantee ; and the power of repurchase, not arising from the nature of the contract, but being a special privilege given to one of the parties without any corresponding right in the other, must be strictly exercised (g).

Defeasible
conveyances
not
necessarily
mortgages.

Therefore, where in one case it was agreed at the time of the conveyance (h), that the premises should be reconveyed by the purchaser on payment of the original consideration money and the expenses of the conveyance, within a limited time ; and in

(c) *Chambers v. Goldwin*, 9 Ves. 254 ; *Bell v. Carter*, 17 Beav. 11 ; *Sampson v. Pattison*, 1 Hare, 533 ; *Jenkin v. Row*, 5 De G. & Sm. 107 ; *Locking v. Parker*, L. R. 8 Ch. 30 ; *Re Alison, Johnson v. Mounsey*, 11 Ch. D. 284.

(d) *Exton v. Scott*, 6 Sim. 31.

(e) *St. John v. Wareham*, cited 3 Swans. 631 ; *Barrell v. Sabine*, 1 Vern. 268, *Ensworth v. Griffiths*, 5 Bro. P. C. 184 ; *Perry v. Meddowcroft*, 4 Beav. 197 ; *Manchester, Sheffield, and Lincolnshire Rail. Co. v. North Central Waggon Co.*, 13 App. Cas. 554.

(f) *Goodman v. Grierson*, 2 Ba. & Be. 278 ; *Alderson v. White*, 2 De G. & J. 97 ; 4 Jur. (N.S.) 125 ; *Tapply v. Sheather*, 8 Jur. (N.S.) 1163 ; *Shaw v. Jeffery*, 13 Moo. P. C. 432.

(g) See *Thornborough v. Baker*, 3 Swans. at p. 631 ; *Pegg v. Wisden*, 16 Beav. 239 ; *Barrell v. Sabine*, 1 Vern. 286 ; *Joy v. Birch*, 4 Cl. & F. 57.

(h) *Williams v. Owen*, 5 Myl. & Cr. 303 ; *Acton v. Acton*, Pre. Ch. 237 ; but see *Waters v. Mynn*, 14 Jur. 341.

Paragraphs
18—19

another (*i*), where after an absolute release of the equity of redemption to the mortgagee for a further sum, the mortgagee (being then in the position of a purchaser) demised the estate to the former mortgagor for a term at a rent, and agreed at the same time that, upon punctual payment of the rent, the estate might be repurchased at a fixed price, and within a certain time, but in default of payment of the rent, the agreement was to be void:—it being clear in these cases that there was no mutuality (in other words, that the purchasers had no means of compelling the repayment of their consideration moneys, but that the power of repurchase was a privilege only)—redemption was refused in the first case after the period fixed had passed; and repurchase in the other within the period, but upon default of payment of the rent, though the arrears due were tendered with the purchase-money.

Defeasible
purchase of
equity of
redemption.

19. The strict condition has also been upheld, even in transactions relating to securities; as where (*k*), upon a release by the mortgagor to the mortgagee of the equity of redemption, it had been agreed that the mortgagee should reconvey upon repayment to him within a fixed time of the original debt, with the consideration for the release and interest and the outlay for repairs or improvements. So if the creditor agree to forego part of his debt upon payment of the residue at a fixed day, or to refrain from entering up judgment if an insurance be kept up, the latter contract is not in the nature of a penalty or forfeiture, and the creditor may take advantage of failure in the strict performance of it; and in the former no relief will be given in case of default, but the mortgagee will be entitled to the whole of his original demand, notwithstanding continued payments of interest on the lesser sum (*l*).

An agreement by one who had contracted to buy an estate, that it should be conveyed to a person who had advanced him part of the purchase-money, with a proviso to be void on repayment of the advances with interest, and of the whole amount of the purchase-money at a certain day, otherwise the sale to be absolutely confirmed to the lender, was also held to be a conditional sale (*a*).

It is the same if there be a conveyance of land conditioned to be void on payment of a sum of money at a certain day; for it is in the election of the settler either to pay the money or to let

(*i*) *Davis v. Thomas*, 1 Russ. & Myl. 506; Tam. 416; so in *St. John v. Wareham*, cited 3 Swans. 631.

(*k*) *Ensworth v. Griffiths*, 5 Bro. P. C. 184; *Gossip v. Wright*, 9 Jur. (N.S.) 592; and see also *Sterne v. Beck*, 32 L. J. Ch. 682; *Wallingford v. Mutual Society*, 5 App. Cas. 685; and see *Protector Loan Co. v. Grice*, 5 Q. B. D. 592.

(*l*) *Ford v. Earl of Chesterfield*, 19 Beav. 428; *Thompson v. Hudson*, L. R. 4 H. L. 1; *Parry v. Great Ship Co.*, 4 B. & S. 556. And see *Tasburgh v. Echlin*, 2 Bro. P. C. 265; *Ogden v. Battams*, 1 Jur. (N.S.) 791.

(*a*) *Perry v. Meddowcroft*, 4 Beav. 197.

the settlement stand, but not in that of the grantee to compel payment (b). Paragraphs
19—21

20. In every case the question is what, upon a fair construction, is the meaning of the instrument; and the true nature and not the form of the transaction is to be regarded (c). The inadequacy of the consideration to the value of the property, the taking by the grantee of immediate possession under the conveyance, and the payment by him or by the grantor of the costs of the transaction, or of insurances and other outgoings of the property, will be taken into consideration, but will not be conclusive upon the question whether a doubtful instrument was intended to take effect by way of mortgage or of sale (d). Circumstances of pressure upon the grantor (as where he is insolvent and in prison, or represented by the same solicitor as the grantee) will materially influence the court in construing an apparently absolute or conditional sale, as a mortgage, where, in the absence of such circumstances, the mere insufficiency of price would be little regarded. Weight will be also given to the circumstance that, in the peculiar position of the grantor, a mortgage might be beneficial to him when a sale would not (e). On the other hand, it may be shown that a contract that a conditional sale should become absolute upon the happening of a certain event, was entered into by the grantor with the full knowledge of the consequences (f), and what was the nature of an instrument uncertain upon the face of it (g); but such evidence will not be allowed to affect an inference that the transaction, though in form a sale, was only a mortgage, where that inference is founded upon strong circumstances (h).

21. Somewhat akin to the case of a conditional sale is that of a condition in a settlement, that, upon payment of a sum of money by a person in a certain event, and at a certain time, the prior limitations of an estate shall cease, and the land go to the person paying the money. On the happening of the event, this will be only a security for money, and will be redeemable (i). But it will

(b) *King v. Bromley*, 2 Eq. Ca. Abr. 595; and see *Ensworth v. Griffiths*, 5 Bro. P. C. 184.

(c) *Re Watson, Exp. Official Receiver in Bankruptcy*, 25 Q. B. D. 27; *Madell v. Thomas*, [1891] 1 Q. B. 230.

(d) *Thornborough v. Baker*, 3 Swans. at p. 632, per Lord NOTTINGHAM; *Williams v. Owen*, 5 Myl. & Cr. 303; *Langton v. Horton*, 5 Beav. 9; *Douglas v. Culverwell*, 31 L. J. Ch. 543, per TURNER, L.J.; *Davis v. Thomas*, 1 Russ. & Myl. 506; nor will payment of the expenses by the grantor be conclusive evidence of an intended mortgage. (*Alderson v. White*, 2 De G. & J. 97.)

(e) *Fee v. Cobine*, 11 Ir. Eq. Rep. 406.

(f) *Newcomb v. Bonham*, 1 Vern. 8, 214, 232.

(g) *Langton v. Horton*, 5 Beav. 9.

(h) *Id.*

(i) *Frederick v. Aynscombe*, 1 Atk. 392.

Paragraphs
21—23

be different (*k*) if the proviso be that, unless (in the happening of the event) the person entitled under the limitation pay to another a certain sum within a limited time, the land shall go over to the latter in fee ; for here there is a limitation over upon default of payment at the appointed day, to treat which as redeemable would destroy the distinction between a condition and a limitation over.

No
foreclosure
in case of
conditional
sales.

22. It follows from what we have seen of the nature of foreclosure, that in these cases of conditional sales and settlements, there being no power in the person to whom the money may be paid to compel payment of it, and no forfeiture, but a permissive right of payment only, there is no equity of redemption which can be the subject of an action for foreclosure (10).

Grants of
annuities
with right of
repurchase.

23. Another kind of redeemable interest is that in which the person to whom the consideration money is paid, grants, not the estate, but a terminable annuity or rent-charge issuing thereout, with a clause of repurchase. The effect of the transaction is somewhat of the nature of a Welsh mortgage, the money borrowed being repaid by instalments, consisting partly of interest and partly of principal (*l*) (10). The Court of Chancery, treating annuities so granted as designed merely to secure loans and to avoid the Statutes of Usury, was disposed to consider them as redeemable annuities, and to admit unwillingly the distinction between redemption and repurchase in cases in which the grant of the annuity and the stipulation for repurchase formed part of the same transaction ; especially if the words “ redemption ” and “ repurchase ” appeared to have been used synonymously ; though the word “ repurchase ” was construed with the strictness of a condition, where the grantee had been for some time in possession as purchaser (*m*). The presence of a stipulation that notice should be given of the intention to repurchase, and the condition for repayment of the purchase-money, with a further sum amounting to the value of the interest during the period of notice, were circumstances (*a*) upon which the court relied, as indications that a loan was intended, and that the object was to allow time to find another borrower, and to secure interest in the mean time ; though the latter condition was one upon which Lord *Redesdale* thought that much stress ought not to be laid (*b*).

(*k*) *Man's* (*Sir Thomas*) case, cited *Freem.*, Ch. 206 ; *Earl Winchelsea v. Wentworth*, 1 Vern. 402 ; *Earl Winchelsea v. Norcliffe*, 1 Vern. 430.

(*l*) *Floyer v. Sherard*, Ambl. 18 ; *Lawley v. Hooper*, 3 Atk. 278. But this seems to be the only resemblance, for possession is not of the essence of the transaction, and foreclosure may be had. See also *Secretary of State for India v. British Empire Mutual Life Assurance Society*, 67 L. T. 434.

(*m*) *Longuet v. Scawen*, 1 Ves. Sen. 402 ; *Bulwer v. Astley*, 1 Ph. 422.

(*a*) *Lawley v. Hooper*, 3 Atk. 281 ; *Bulwer v. Astley*, 1 Ph. 422.

(*b*) *Verner v. Winstanley*, 2 Sch. & Lef. 393.

At present, unless there be plain indications that the intention was to contract a debt, the transaction is regarded merely as a purchase (c). Paragraphs
23—24

SECTION II.

Equitable Mortgages.

	PARAGRAPH
Definition	24
Two classes of equitable mortgages	25
Mortgages of equitable rights by equitable owners	26
Equitable mortgages of legal rights	27
Mortgage by deposit of some documents only, how far valid	28-29
Equitable sub-mortgage of equitable mortgage	30
Equitable mortgages of land certificates	31
Intention to create equitable mortgage, how proved	32-34
Mortgage by deposit <i>primà facie</i> binds depositor's interest in all property comprised in the deeds	35
Mortgage by deposit extends <i>primà facie</i> only to debt for which it was given, but may be extended by evidence	36
Creditor must prove that deeds were deposited with him as security	37
Equitable mortgages are subject to order and disposition clauses of Bankruptcy Act	38

24. An equitable mortgage is a contract operating as a security, Definition. but which, for want of a transfer of the legal estate, can only be enforced under the equitable jurisdiction of the court, which carries it into effect either by giving the creditor immediately the appropriate remedies, or by compelling the debtor to execute a security in accordance with the contract(d). It is applicable to all property of which a legal mortgage can be made. Even shipping, Government stocks, and shares in railways and other public companies (which can only be transferred so as to pass the legal property in a particular manner, and by the forms of assurance prescribed by the statutes or deeds of settlement to which they are subject), may be equitably charged without going through those formalities. For, where a statute or other restraining instrument merely points out the manner in which a complete legal transfer can alone be made, an equitable interest may nevertheless be created by other means. Moreover, an equitable mortgage (herein differing from a legal one) may be created by general words or even with regard to future acquired property. Thus a mortgage of all the mortgagor's "real and personal property whatsoever and wheresoever" is not void for uncertainty nor as being against public policy if it is possible at the time when the charge is sought to be enforced to point out the property comprised in it(e). The ordinary debenture of a limited company is a common example of this.

All property may be equitably mortgaged.

(c) *Knox v. Turner*, L. R. 5 Ch. 515 ; *Preston v. Neele*, 12 Ch. D. 760.
(d) *Ashton v. Corrigan*, L. R. 13 Eq. 76 ; *Hermann v. Hodges*, L. R. 16 Eq. 18.
(e) *Re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530.

Paragraphs
25—27

Two classes
of equitable
mortgages.

Mortgages
of equitable
rights by
equitable
owners.

Equitable
mortgages of
legal rights.

25. Equitable mortgages may be divided into two classes, viz. ; (1) Mortgages by *equitable* owners of their equitable rights ; and (2) the creation by *legal* owners of equitable rights by way of security.

26. Mortgages by equitable owners of their equitable rights usually occur in the case of mortgages of equities of redemption, as mortgages of property by beneficiaries under a trust. In either case the legal ownership is not in the mortgagor, but in the prior mortgagee, or the trustee, as the case may be. Such mortgages, as a rule, are created by formal deeds similar to those used for creating legal mortgages. And indeed, where it is designed to incorporate the powers of sale and other powers conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, a deed is essential (*f*). Moreover, if the mortgage is not based on valuable consideration, it is equally essential that it should purport to operate by way of a complete assignment of all the mortgagor's equitable interests ; for although equity will give effect to a completed voluntary assignment of equitable rights (*g*), it will not give effect to an incomplete assignment or one resting on executory contract only (*h*). At the same time, where the transaction rests on valuable consideration actually given, a deed is not *necessary*, however desirable it may be.

27. Equitable mortgages of the property of legal owners, on the other hand, are created by some instrument or act which is insufficient to pass the legal title, but which, being founded on valuable consideration, shows the intention of the parties to create a security ; or in other words, evidences a contract to do so. The following are common examples of such mortgages.

An agreement or covenant to create a security in consideration of a debt due or of an advance made (*i*) ;

A document charging the property with the debt and containing a declaration by the debtor that he holds the property in trust for the creditor (*j*) ;

A conditional surrender of copyhold ; or, if a prior mortgagee have been admitted (in which case a surrender would only be evidence of a contract), a release of the equity of redemption (*k*) ;

(*f*) Sec. 19 (1) of the Act.

(*g*) *Kekewich v. Manning*, 21 L. J. Ch. 577.

(*h*) *In re Earl of Lucan, Hardinge v. Cobden*, 45 Ch. D. 470.

(*i*) *Sir Simeon Stewart's case*, cit. 3 Ves. Jun. 576 ; 2 Sch. & Lef. 381 ; *Eyre v. M'Dowell*, 9 H. L. C. 619 ; *Exp. Jones, Re Blew* 4 L. J. (N.S.) Bk. 59 ; *Tebb v. Hodge*, L. R. 5 C. P. 73 ; *Parish v. Poole*, 53 L. T. 35 ; *Re Hurley's Estate*, [1894] 1 L. R. 488.

(*j*) *London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642. These documents now almost invariably contain a clause enabling the creditor without any reason to remove the debtor from the trusteeship, and to appoint himself or any other person to be a new trustee in his place. By this device, and with the assistance of sect. 12 of the Trustee Act, 1893, the creditor can at will vest the legal estate in himself or a nominee.

(*k*) 1 Watk. Cop. 148, n.

An authority to sell and retain the debt out of the proceeds (l) ; Paragraph
27
An assignment of rent (m) ;

Any written instrument showing the intention of the parties that a security should be thereby created, although it contains no general words of charge, *ex. gr.*, the appointment of a receiver to receive rents and pay an annuity thereout (n) ; but a mere *executory* agreement to borrow or lend money on mortgage, not intended to *create* a present security will not constitute an equitable mortgage, nor will specific performance of such an agreement be decreed, the damage being a mere money demand (o). And even where after such an agreement an advance has been made, yet if it be made for a longer time or on other terms than those mentioned in the agreement, there will be no equitable mortgage (p).

A power of attorney to the creditor to confess judgment in ejectment (q) ; or to receive rents and profits and apply them in payment of interest ; or to repay himself out of the surplus proceeds of the sale of an estate in mortgage to the debtor ; or to mortgage the debtor's land for payment of the debt (r) : such a power, when intended to operate as a security, being irrevocable until the discharge of the debt, and giving a right to a judgment for an account, and to the ultimate remedies of equitable mortgagees (s).

But in addition to the above, by an extraordinary stretch of power, Courts of Equity have held (and it is now firmly established) that notwithstanding the provisions of the Statute of Frauds an equitable mortgage may be created by the delivery to the creditor or his agent, of deeds, copies of court rolls or other documents of title, with intent to create a security thereon, without any written evidence of such intent (t). The doctrine appears to be founded on the doctrine of part performance of a contract taking it out of the statute, and consequently actual deposit as security for an

(l) *Exp. Hodgson, re Cook*, 1 Gl. & J. 13.

(m) *Exp. Wills*, 1 Ves. Jun. 162 ; 2 Cox, 233.

(n) *Cradock v. Scottish Provident Institution*, 70 L. T. 718.

(o) *Chinnock v. Sainsbury*, 6 Jur. (N.S.) 1318 ; *Rogers v. Challis*, 27 Beav. 175 ; *South African Territories, Ltd., v. Wallington*, [1898] A. C. 309. See *Sichel v. Mosenthal*, 8 Jur. (N.S.) 275 ; *Hunter v. Langford*, 2 Mol. 272 ; *Larios v. Bonany Y. Gurety*, L. R. 5 P. C. 346 ; *Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271. The rule seems to have been overlooked in *Alliance Bank v. Broom*, 2 Drew & Sm. 289. Compare *Starkey v. Barton*, [1909] 1 Ch. 284.

(p) See *Burton v. Gray*, L. R. 8 Ch. 932.

(q) *Dale v. Smithwick*, 2 Vern. 151.

(r) *Spooner v. Sandilands*, 1 Y. & Coll. C. C. 390 ; *Abbot v. Stratten*, 3 Jo. & Lat. 603 ; *Hodgson's case*, 1 Gl. & J. 13 ; *Re Parkinson's Estate*, 13 L. T. (N.S.) 26.

(s) *Walsh v. Whitcomb*, 2 Esp. 565 ; *Abbott v. Stratten*, *supra* ; *Gaussen v. Morton*, 10 B. & C. 731.

(t) *Russel v. Russel*, 1 Bro. Cl. Ca. 269 ; *Exp. Warner*, 19 Ves. 202 ; *Whitbread v. Jordan*, 1 Y. & Coll. Ex. 303.

Paragraphs
27—31

actual debt or advance is a *sine quâ non* (*u*). Unless there be actual deposit the alleged equitable mortgage must rest, if at all, on a written memorandum or other document signed by the mortgagor (*x*). If there be such a document, however, the mortgage will be good even although the documents to be deposited pursuant to it are not executed at its date (*y*). On the other hand, an equitable mortgage will not be created if the document is in its nature executory—as, for instance, if it merely expresses an intention to make a security, not followed by an actual deposit; or is a mere agreement to borrow or lend money (*a*), or merely consists of a notice of intention to make the security communicated to the creditor, while the debtor was lawfully entitled to do so; though such a memorandum may create a trust for payment of the debt (*b*).

Mortgage by deposit valid although all the title deeds are not deposited.

28. An equitable mortgage by deposit may be valid if only some or one of the material documents of title to the property have been deposited (*c*), although a complete title be not thereby shown to the depositor's interest in the estate (*d*). And it follows, that if part of the material documents of title be deposited with one person, and part with another, each depositee may have a good security (*e*), unless there be evidence of a contrary intention (*f*).

Deposit of receipt for purchase money sometimes sufficient.

29. An equitable mortgage may be created by the deposit of a receipt for purchase-money, containing the terms of the agreement for sale, if there be no title deeds or conveyance in the depositor's possession (*g*), or even of a map of the property (*h*); but not by a deposit of an attested copy of a deed (*i*).

Equitable sub-mortgage of equitable mortgage.

30. An equitable sub-mortgage of an equitable security may be created without a deposit of the memorandum given with the original security (*k*).

Equitable mortgages

31. Under the Land Transfer Act, 1875, subject to any registered

(*u*) *Exp. Coombe*, 4 Mad. 249; *Exp. Perry*, 3 Mont. D. & De G. 252; *Exp. Halifax*, 2 ib. 544.

(*x*) *Exp. Leathes*, 3 Deac. & C. 112; *Exp. Heathcote*, 2 Mont. D. & De G. 711; *Dan v. Terrell*, 33 Beav. 218.

(*y*) *Exp. Orrett, re Pye*, 3 Mont. & A. 153, and see *Exp. Smith, re Hildyard*, 2 Mont. D. & De G. 587; and *Exp. Sheffield Union Banking Co., re Carter and Justins*, 13 L. T. (N.S.) 477.

(*a*) *Chinnock v. Sainsbury*, 6 Jur. (N.S.) 1318; *Rogers v. Challis*, 27 Beav. 175. See *Sichel v. Mosenthal*, 8 Jur. (N.S.) 275; *Hunter v. Langford*, 2 Mol. 272; *Larios v. Bonamy Y. Gurety*, L. R. 5 P. C. 346; *Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271. The rule seems to have been overlooked in *Alliance Bank v. Broom*, 2 Drew & Sm. 289.

(*b*) *Wilson v. Balfour*, 2 Camp. 579. See *Re Bankhead's Trust*, 2 K. & J. 560.

(*c*) *Exp. Arkwright*, 3 Mont. D. & De G. 129; *Lacon v. Allen*, 3 Drew. 579.

(*d*) *Exp. Wetherell*, 11 Ves. 398; *Roberts v. Croft*, 24 Beav. 223; 2 De G. & J. 1.

(*e*) *Roberts v. Croft, supra*.

(*f*) *Exp. Pearse*, Buck, 525.

(*g*) *Goodwin v. Waghorn*, 4 L. J. (N.S.) Ch. 172.

(*h*) *Simmons v. Montague*, [1909] 1 Ir. R. 87.

(*i*) *Exp. Broadbent, re Barrow*, 1 Mont. & A. 635; 4 Dea. & C. 3; per Sir J. Cross and Sir G. Rose.

(*k*) *Exp. Smith, re Hildyard*, 2 Mont. D. & De G. 587.

estates charges or rights, the deposit of the land certificate in the case of freehold land, and of the office copy of the registered lease in the case of leasehold land, shall, for the purpose of creating a lien on the land to which such certificate or lease relates, be deemed equivalent to a deposit of the title deeds of the land (l). Paragraphs
31—33
of land
certificates.

32. The intent to create an equitable mortgage by delivery or deposit of writings may be established by written documents alone, or coupled with parol evidence (a); by parol evidence alone (b); or by inference arising from the deposit, where the possession of the documents by the holder cannot be otherwise explained (c). But an inference that the deposit was made by way of equitable mortgage, will not be admitted in contradiction to a written statement (d), the terms of which, when it exists, will govern the contract, where it is consistent with a security (e); nor by reason of the possession by a solicitor of his client's deeds, as against a purchaser who does not inquire into the nature of the possession (f); nor when there is no evidence as to the origin of the possession from which a contract may be inferred (g). An intention to create an equitable mortgage may be inferred from a delivery of the documents to be held, or a direction to hold them, until the settlement of an account or the execution of a mortgage (h), or for the purpose of preparing a legal mortgage for an existing debt (i). Intention to
create
equitable
mortgage
provable by
parol, or may
be inferred.

33. Where a document remains in the possession of a debtor, a memorandum annexed to it, purporting to appropriate the proceeds to satisfy the debt, will not generally of itself create a charge (j). But a charge may be created where the document is in the actual Where
documents
remain in
debtor's
custody a
memorandum
of charge

(i) 38 & 39 Vict. c. 87, s. 81. Like provision as to deposit of certificate under Record of Title Act (Ireland), 1865, s. 21.

(a) *Casberd v. Att.-Gen.*, Dan. 238; 6 Pr. 411; *Ede v. Knowles*, 2 Y. & Coll. C. C. 172; *Burgess v. Moxon*, 2 Jur. (N.S.) 1069; *Re Boulter, Exp. National Provincial Bank of England*, 4 Ch. D. 241.

(b) *Russel v. Russel*, 1 Bro. C. C. 269; *Exp. Kensington*, 2 Ves. & B. 79; *Exp. Haigh*, 11 Ves. 403; *Exp. Mountfort*, 14 Ves. 606.

(c) *Featherstone v. Fenwick*, 1 Bro. C. C. 270, n.; *Harford v. Carpenter*, 1 Bro. C. C. 270, n.; *Edge v. Worthington*, 1 Cox, 211; *Exp. Langston*, 17 Ves. 227.

(d) *Exp. Coombe*, 17 Ves. 369; *Exp. Borradaile, re Rucker*, 2 Mont. & A. 398.

(e) *Shaw v. Foster*, L. R. 5 H. L., at p. 341, per Lord Cairns.

(f) *Bozon v. Williams*, 3 Y. & J. 150, per ALEXANDER, C.B. The solicitor may, nevertheless, hold the deeds by his client's appointment as trustee for another person, between whom and a subsequent purchaser to whom they are fraudulently delivered serious questions of priority may arise. See *Lloyd v. Attwood*, 3 De G. & J., at p. 651.

(g) *Exp. Jones, Re Oliver*, 3 Mont. & A. 152, 327; *Chapman v. Chapman*, 13 Beav. 308. Doubted in *Burgess v. Moxon* (2 Jur. (N.S.) 1059), in which a memorandum was produced containing a proposal by the debtor that the deeds should be held as security; and held that the burthen was on the debtor to show that the creditor was only a bailee. But note that in *Chapman v. Chapman* there was no evidence as to the nature of the creditor's possession, and nearly twenty years had elapsed since the date of the bond. See *Dixon v. Muckleston*, L. R. 8 Ch. 155.

(h) *Fenwick v. Potts*, 8 De G. M. & G. 506; *Lloyd v. Attwood*, 3 De G. & J. 614.

(i) *Edge v. Worthington*, 1 Cox, 211; *Exp. Bruce*, 1 Rose, 374; *Hockley v. Bantock*, 1 Russ. 141; *Keys v. Williams*, 3 Y. & C. 55.

(j) *Adams v. Claxton*, 6 Ves. 226.

Paragraphs
33—36

annexed not
generally
sufficient.

Where
documents
in hands of
a third party
oral request
to him to
hold for
creditor not
sufficient.

Mortgage
by deposit
prima facie
binds all the
mortgagor's
interest in
the property
comprised
in deeds.

Mortgage
by deposit

keeping of the debtor, if it be in the legal custody of the creditor ; as where the debtor properly holds it as his servant (*k*) or solicitor (*l*) ; even though the creditor was not aware of the creation of the security (*l*).

34. Where a third party already has possession of deeds, an oral communication from a part owner of the property to which they relate, purporting to make such third party a trustee of the part owner's interest for a creditor, will not create a good equitable mortgage ; as such a communication is not part performance of a contract to give such mortgage so as to take the case out of the Statute of Frauds (*m*). It will, however, be otherwise if there be a written memorandum (*n*).

35. An equitable mortgage by deposit, will effect, *prima facie*, the beneficial interest of the mortgagor (*o*) in all the property comprised in the deposited documents (*p*), including accretions (*q*) ; but the agreement, if any (which may be explained by other written evidence), will be the measure of the security (*r*), as well with respect to the particular estates included in the security (*s*), as to the extent to which the interest of the mortgagor therein is intended to be affected (*t*). The security will not be extended to property not included in the deposited documents, as against prior incumbrancers, merely by reason of a false statement by the mortgagor to the mortgagee that such property is included therein (*u*). And if the memorandum of deposit refer to deeds which are not shown to have been deposited, and other deeds are deposited, the actual deposit will constitute the security (*x*).

36. An equitable mortgage will, *prima facie*, be a security only for the debt specified in the agreement, and will not include debts

(*k*) *Ferris v. Mullins*, 2 Sm. & G. 378.

(*l*) See *Re Pidcock*, *Penny v. Pidcock*, 51 Sol. J. 514 ; *Middleton v. Pollock*, 2 Ch. D. 104 ; *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231 ; *Sharp v. Jackson*, [1899] A. C. 419.

(*m*) *Exp. Broderick, Re Beetham*, 18 Q. B. D. 766 ; *Exp. Coming*, 9 Ves. 115.

(*n*) *Lloyd v. Attwood*, 3 De G. & J. 614.

(*o*) *Manningford v. Toelman*, 1 Coll. C. C. 670 ; *Stackhouse v. Countess Jersey*, 1 Johns. & H. 721 ; *Cory v. Eyre*, 1 De G. J. & S. 149 ; *Exp. Wright, re Watts*, 3 Mont. & A. 49 ; *Exp. Smith, re Hildyard*, 2 Mont. D. & De G. 587.

(*p*) *Ashton v. Dalton*, 2 Coll. C. C. 565 ; *Exp. Bisdee*, 1 Mont. D. & De G. 333.

(*q*) *Exp. Bisdee*, 1 Mont. D. & De G. 333 ; *Exp. Farley*, 1 Mont. D. & De G. 683 ; *Chissum v. Deves*, 5 Russ. 29.

(*r*) *Exp. Glyn, re Medley*, 1 Mont. D. & De G. 29 ; *Exp. Loyd, re Walmesley*, 3 Dea. & C. 765 ; *Exp. Hunt*, 1 Mont. D. & De G. 139.

(*s*) *Wylde v. Radford*, 9 Jur. (n.s.) 1169 ; *Exp. Robinson, re Evans*, 1 Dea. & C. 119 ; *Exp. Leathes*, 3 Dea. & C. 112 ; *Exp. Heathcote*, 2 Mont. D. & De G. 711 ; *Daw v. Terrell*, 33 Beav. 218.

(*t*) *Pryce v. Bury*, 17 Jur. 1173 ; 18 Jur. 967.

(*u*) *Jones v. Williams*, 24 Beav. 47.

(*x*) *Exp. Powell, re Moore*, 6 Jur. 490.

previously due from the mortgagor to the mortgagee (*y*); but it may include such debts, if an intention that it should do so appear from the circumstances (*z*). And an equitable mortgage by deposit, although accompanied by a written agreement, may, either by written or parol evidence (*a*), and also, as it seems, by inference alone, arising from possession of the deed (*b*), be extended to further advances, even where changes have occurred in the depositor's firm (*c*). A legal security cannot be extended by such means to subsequent advances made on a parol agreement for a further mortgage; because, it is said, the legal mortgagee holds his mortgage as a contract for conveyance only, and not for deposit (*d*). And it would seem that the leaving of the documents in the custody of each successive firm is constructively a re-deposit (*e*). It cannot, however, be shown by parol that the depositor holds the documents as security both for his own debt and that of another person (*f*); though, if the depositor himself be no creditor, but a trustee only, he may be shown to hold them for another's benefit (*g*).

Paragraphs
36—37

extends only to debt for which it was given, but may be extended by evidence.

37. In order to connect a debt of long standing with the possession of the debtor's deeds, the creditor must proceed upon a distinct allegation, supported by proper evidence, that they were delivered to him by way of security (*h*). Nor, if the plaintiff's evidence of the deposit be defective at the hearing, will he be entitled to an inquiry to enable him to establish his security; because a reference will not then be directed upon a matter which involves the very root of the plaintiff's title (*i*). The rule in bankruptcy also requires that evidence be given of the intention to effect a security by deposit. The usual order for sale in cases of equitable mortgage has been

Creditor must furnish evidence that deeds were deposited by way of mortgage.

(*y*) *Mountford v. Scott*, Turn. & R. 274; *Exp. Martin*, 2 Mont. & A. 243.

(*z*) *Exp. Farley*, 1 Mont. D. & De G. 683; *Exp. Smith, re Hildyard*, 2 Mont. D. & De G. 587.

(*a*) *Exp. Whitbread*, 19 Ves. 209; *Exp. Nettleship*, 2 Mont. D. & De G. 124; *Exp. Sanders*, 3 L. J. (N.S.) Bk. 92.

(*b*) See *James v. Rice*, 5 De G. M. & G. 461.

(*c*) *Exp. Kensington*, 2 Ves. & B. 79; *Exp. Lloyd*, 1 Gl. & J. 389; *Re Alexander, Exp. Tills*, 1 Gl. & J. 409.

(*d*) *Exp. Hooper*, 1 Mer. 7; and see *Shepherd v. Titley*, 2 Atk. 348; where, however, there was an intervening incumbrance. Thus a person who has obtained a legal mortgage may, as to future advances, be in a worse position than an equitable mortgagee. But the distinction was confessedly made to avoid an extension of the doctrine acted upon in *Exp. Langston*, 17 Ves. 227. The result justifies the remark made in another case by Lord ELDON, that "departing from the Statute (of Frauds), we have no rule to go by."

(*e*) *Exp. Kensington*, 2 Ves. & B. 79; *Exp. Oakes*, 2 Mont. D. & De G. 234; *Exp. Smith, re Gye*, 2 Mont. D. & De G. 314.

(*f*) *Exp. Whitbread*, 19 Ves. 209; *Exp. Crossfield*, 3 Ir. Eq. Rep. 67.

(*g*) *Exp. Whitbread*, 19 Ves. 209.

(*h*) *Chapman v. Chapman*, 13 Beav. 308; 15 Jur. 265; *Re McMahon, McMahon v. McMahon*, 55 L. T. 763.

(*i*) *Holden v. Hearn*, 1 Beav., at p. 456; *Keble v. Philpot*, 7 L. J. (N.S.) Ch. 237.

Paragraphs
37—38

refused (*k*) after the lapse of twelve years from the date of the deposit, there being no memorandum, and the bankrupt being dead. But an inquiry will sometimes be directed in bankruptcy as to the circumstances attending a deposit of doubtful effect (*l*).

Equitable
mortgages
are subject to
order and
disposition
clause in
Bankruptcy
Act.

38. An equitable mortgage or sub-mortgage of property which is within the rules of law concerning property in the order and disposition of a bankrupt, will be valid as against the trustee in bankruptcy of the mortgagor, only when the mortgagor has given such notices and done such other acts as are necessary in like cases to perfect the title of a legal mortgagee (*m*) (**1226**); but as between the contracting parties the equitable mortgage will be valid, although such acts be omitted (*n*).

(*k*) *Exp. Jones, re Oliver*, 3 Mont. & A. 152, 327.

(*l*) *Exp. Clouter*, 7 Jur. 135.

(*m*) *Exp. Spencer*, 1 Dea. 468 ; 3 Mont. & A. 697 ; *Exp. Vallance re Lashman*, 2 Dea. 354 ; *Exp. Arkwright*, 3 Mont. D. & De G. 129 ; *Exp. Wood*, 3 Mont. D. & De G. 315 ; *Exp. Boulton*, 1 De G. & J. 163.

(*n*) *Cook v. Black*, 1 Hare 390.

CHAPTER II.

Of Mortgages of Lands.

Section I.—Of the Modes of Creating Mortgages of Freehold, Copyhold, and Leasehold Land, where the Title is not registered.

„ II.—Of the necessity in certain cases of Registering Mortgages of Land under Local Acts.

„ III.—Of the Modes of Creating Mortgages of Freehold and Leasehold Land, where the Title is registered under the Land Transfer Acts.

SECTION I.

Of the Modes of Creating Mortgages of Freehold, Copyhold, and Leasehold Land, where the Title is not registered.

	PARAGRAPH	Paragraph
<i>Mortgages of freeholds, how created</i>	39	39
<i>Mortgages of copyholds, how created</i>	40	
<i>Until admittance a mortgage of copyholds is merely equitable</i>	41	
<i>Effect of admittance on the mortgagee's rights</i>	42	
<i>Lord not bound to accept surrender embarrassed with trusts</i>	43	
<i>Mortgages of copyholds for lives</i>	44	
<i>Mortgages of leaseholds, how created</i>	45	
<i>Mortgage of an existing term</i>	46	
<i>Liability to forfeiture of term lessened since 1881</i>	47	
<i>Mortgagee entitled to relief even after forfeiture</i>	48	
<i>Advantages of mortgage by way of sub-demise</i>	49	
<i>Liability to covenants follows the legal and not the equitable ownership</i>	50	

39. The creation of equitable mortgages of land by deposit of the title deeds has been already discussed (27–38). A legal mortgage of freeholds and also an equitable mortgage of an equitable interest (as for instance an equity of redemption) is usually made by a conveyance of the property in fee, subject to a proviso for redemption on payment of the debt and interest on a specified day. It was at one time occasionally made by a conveyance to trustees upon trust for sale in case of non-payment of the debt at a certain time,

Legal mortgages of freeholds.

Paragraphs
39—41

with a declaration that the mortgagee might enter and take the rents and apply them in keeping down the interest. This form (which is now practically obsolete) is not desirable in the interest of the creditor, as the remedy by action for foreclosure is not available. Nevertheless, curiously enough, if the mortgagor commences an action for redemption in such a case, and the action be dismissed, he would be foreclosed (a); and, moreover, the trust for sale is not a trust which could be enforced by the mortgagor, as in substance the deed is a mere mortgage and not a settlement (b). As Lord Justice *James* said in *Locking v. Parker* (c): "I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position, which is that of mortgagee." Accordingly it has been held that a mortgagee under such a mortgage who has been in possession for twenty years without acknowledgment can make a good title to the property under the Statute of Limitations (d).

Legal
mortgage of
copyholds
effected by
conditional
surrender
and
admittance.

40. A legal mortgage of a copyhold estate is effected by a surrender of the copyhold, subject to a condition that the surrender shall be void upon payment of the money at the day fixed; and is perfected by the admittance of the mortgagee. When the copyhold only forms part of the security, the surrender is usually made in pursuance of a covenant to surrender contained in the accompanying mortgage of the freehold or leasehold estate, and the covenants for title in which are made to extend to the copyholds; or, if there be no such other security, the covenants for payment and title, if made, are alone contained in a separate deed.

Until
admittance
the mortgage
is merely
equitable.

41. Until entry upon the court rolls of the conditional surrender, nothing passes by it (e); but this having been done, the mortgagee generally abstains from taking admittance until it becomes necessary or desirable to do so, and in the mean time the fines and fees which would become payable upon his admittance are saved, and he does not become subject to the liabilities incident to copyhold tenancy. His interest, in fact, until admittance, is merely equitable, the surrenderor remaining seised of an estate which is descendible to his heir (even though the lord have accepted rent from the

(a) *Per* JESSEL, M.R., *Re Alison, Johnson v. Mounsey*, 11 Ch. D. at p. 293.

(b) *Ib.* at p. 297.

(c) L. R. 8 Ch. 30, 39.

(d) *Re Alison, Johnson v. Mounsey, supra.*

(e) *Burgaine v. Spurling*, Cro. Car. 283; *Frosel v. Welsh*, Cro. J. 403; *Fawcett v. Lowther*, 2 Ves. Sen. 300; 4 & 5 Vict. c. 35, s. 90.

surrenderee (*f*)), and being liable to the lord both for services and for the purpose of forfeiture (*g*). Nor can the lord, except by special custom, compel the mortgagee to take admittance either before or after condition broken (*h*); though, if by custom the lord may insist upon it and a forfeiture be incurred, there will be no relief in equity against the forfeiture (*i*).

Paragraphs
41—44

42. Upon breach of the condition and admittance of the surrenderee, his estate becomes absolute; and having already before admittance acquired a good title as against all but the lord, he takes upon admittance a title which relates back to the date of the surrender; so that he may recover in ejectment against a purchaser who has taken admittance under a later surrender (*k*). Moreover the mortgagor is no longer “seised” so as to be liable to a manorial heriot which depends on seisin (*l*).

Effect of
admittance.

43. The lord is not bound to accept a conditional surrender which is embarrassed with trusts unless it be warranted by custom, or to recognize persons over whom he has no control, or give effect to a transaction to which he is not a party. He may, therefore, refuse a surrender made subject to such uses as the surrenderee shall appoint by writing, though if he have accepted such a surrender he will be bound by it (*m*), and although he must admit an appointee under a power created by will.

Lord not
bound to
accept
surrender
embarrassed
with trusts.

44. Copyholds for lives are also usually mortgaged by way of conditional surrender, although (in strictness) the surrender of such copyholds, except under a special custom, is a renunciation of the copyhold estate for the lord’s use, without any obligation upon him to regrant it; so that on admittance the tenant would take from the lord and not from the surrenderor, as in the case of copyholds of inheritance (*n*). In mortgages of estates for lives, whether copyhold or leasehold, it is usual, by way of further security, for the mortgagor to insure the lives of the *cestuis que vie*. But where money is raised upon such property by the direction of the court, the insurance of the lives cannot be compelled (*a*).

Mortgages of
copyholds for
lives.

(*f*) *Frosel v. Welsh*, Cro. J. 403.

(*g*) *Doe d. Shewen v. Wrook*, 5 East, 132; *Floyd v. Aldridge*, cited 5 East 137; *The King v. Mildmay*, 5 B. & Ad. 254; Pow. Mort. 433 a, note, ed. 6; 2 Watk. Cop. 117. See *Fawcett v. Lowther*, 2 Ves. Sen. 300; *Minton v. Kirwood*, L. R. 1 Eq. 449, per V.-C. STUART.

(*h*) Watk. Cop. 1, 148, n.

(*i*) *Tredway v. Fothley*, 2 Vern. 367; Scriven, Cop. 1, 195.

(*k*) *Holdfast d. Woollams v. Clapham*, 1 T. R. 600; *The King v. Mildmay*, *supra*; *Benson v. Scott*, 12 Mod. 49; *Doe d. Wheeler v. Gibbons*, 7 Car. & P. 161.

(*l*) *Copestake v. Hoper*, [1908] 2 Ch. 10. This case arose in respect of so-called customary freeholds; but it seems to be equally applicable to true copyholds.

(*m*) *Eddleston v. Collins*, 3 De G. M. & G. 1; *Flack v. Master, &c., of Downing College*, 13 C. B. 945.

(*n*) Watk. Cop. 1, 51, note (1).

(*a*) *Grantley v. Garthwaile*, 6 Mad. 96.

Paragraphs
45—47

Mortgages of
leaseholds,
how created.

45. A mortgage of a term of years may be made either by the creation of a term by the mortgagor for the purpose of the security, or by the mortgage of a term already existing. The practice of demising an estate for a long term of years was adopted in order to prevent the estate of the mortgagee from becoming liable, after condition broken, to dower and other legal charges, and also to keep together the estate and the debt on the death of the mortgagee. Both of these reasons having long since ceased, such mortgages are practically obsolete.

Mortgage of
an existing
term.

46. A mortgage of a term already existing occurs (1) where the term has been created by a will or other instrument, in order to be used as a security when the occasion arises ; in which case, as well as when the term is demised by the mortgage itself, it is commonly not subject to any covenants or rents, except a peppercorn rent ; or (2) where the property is such as is commonly known as leasehold, being held for a term, subject to a valuable rent secured by covenants, and often to other onerous covenants, and to right of re-entry on breach of them by the lessee. A security of the latter kind is liable to destruction by forfeiture of the term, on account of breaches of covenant ; and if the whole term be assigned to the mortgagee, he becomes liable to be sued for the rent and also on the covenants by the lessor, whether he have or have not entered into possession (*b*).

Liability to
forfeiture
lessened since
1881.

47. The liability of a mortgagee of leasehold to lose his security by forfeiture incurred by the mortgagor, is now much lessened. By s. 210 of the Common Law Procedure Act, 1852 (and indeed before then by the doctrines of Courts of Equity), relief was given against forfeiture for non-payment of rent or breach of covenant to insure, upon equitable terms. And by the Conveyancing Act, 1881, c. 41, s. 14, in leases made before or after the commencement of the Act, and notwithstanding any stipulation to the contrary, a right of re-entry or forfeiture *under any other stipulation* in a lease shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach and requiring the lessee to remedy it if capable of remedy, and in any case requiring money compensation to be made ; and the lessee fails within a reasonable time thereafter to remedy the breach and make reasonable compensation to the satisfaction of the lessor. The court is also empowered (either on the application of the lessee, in the lessor's action to enforce the right of re-entry or forfeiture, or in an action brought by himself) to grant relief, or to refuse it, as, having regard to the proceedings and conduct of the parties, and to all the circumstances, it thinks fit ; and to grant it upon such terms, if any, as in the circumstances it thinks fit.

(*b*) *Williams v. Bosanquet*, 1 Bro. & Bing. 238 ; 3 Moore, 500 ; *Stone v. Evans*, Peake, Add. Cas. 94 ; *Haig v. Homan*, 4 Bli. (N.S.) 380.

For the purposes of the enactments, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant, is to take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach. The enactment does not extend to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or (with certain qualifications introduced by s. 2 of the Conveyancing Act, 1892) to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest, or to a covenant or condition in a mining lease, for allowing the lessor to have access to, or to inspect, books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof; or to the law relating to re-entry, or forfeiture, or relief which the courts already gave in case of non-payment of rent.

Paragraphs
47—50

48. A mortgagee of a lease has been held entitled to relief against forfeiture for *non-payment of rent*, if he is willing, within six months after judgment enforcing the forfeiture, to pay all arrears, costs and damages, and to perform all covenants, unless in the mean time third parties have acquired rights which should be infringed thereby (c). But, apparently, relief against forfeiture for breach of any stipulation other than a covenant for payment of rent or to insure, can only be given *before* the forfeiture is completed (d).

Mortgagee sometimes entitled to relief even after forfeiture by lessee.

49. In order to avoid the other inconvenience mentioned above, of imposing upon the mortgagee a liability to pay the rent and fulfil the covenants of the lease, it is proper and usual only to grant him an underlease, reserving to the mortgagor a few days, or other nominal reversion out of the original term (e). This the mortgagor should declare that he will hold upon trust for the mortgagee, and the mortgagee is usually given power to remove the mortgagor from the trust and to appoint himself or any other person to be trustee in the mortgagor's place. By this device and with the assistance of s. 12 of the Trustee Act, 1893, the mortgagee can, when the necessity arises, appoint himself or a purchaser to be trustee of the leasehold reversion and vest it by a vesting declaration (f). And by s. 4 of the Conveyancing Act, 1892, the Court is empowered to protect any such underlessee, even where the original lease is being forfeited (a).

Advantages of mortgage by sub-demise instead of by assignment.

50. The liability to the covenants when the whole term is assigned, being dependent upon the legal ownership, attaches neither to the

Liability to the covenants follows the

(c) *Newbolt v. Bingham*, 72 L. T. 852; *Howard v. Fanshawe*, [1895] 2 Ch. 581; *Humphreys v. Morten*, [1905] 1 Ch. 739.

(d) See *Rogers v. Rice*, [1892] 2 Ch. 170.

(e) See *Bonner v. Tottenham, etc., Building Society*, [1891] 1 Q. B. 161.

(f) *London & County Banking Co. v. Goddard*, [1897] 1 Ch. 642.

(a) See as to this *Wardens, etc., of Cholmeley School, Highgate v. Sewell*, [1894] 2 Q. B. 906.

Paragraphs
50—51

legal and not
the equitable
ownership.

mere equitable interest of a devisee or other assignee of the estate of the mortgagor, nor to that of an equitable mortgagee (*b*) ; nor has the lessor any equity to compel the equitable assignee or deposittee (between whom and himself there is no privity) to take a legal assignment so as to make himself liable to the covenants, even though the equitable assignee have taken possession of the property : the effect of the possession being dependent upon the nature of the title under which it is taken (*c*).

The effect upon a mortgagee by sub-demise of a disclaimer of the original term by the trustee in bankruptcy of the mortgagor, is treated of *infra* (678).

SECTION II.

Of the necessity in certain cases of Registering Mortgages of Land under Local Acts.

	PARAGRAPH
<i>Summary of the requirements of the Middlesex, Yorkshire, and Irish Acts</i>	51
<i>Leases which are exempted from registration</i>	52
<i>Equitable mortgages by deposit need not be registered in Middlesex or Ireland, but aliter in Yorkshire</i>	53

Summary of
the require-
ments of the
Irish,
Middlesex
and
Yorkshire
Registry
Acts.

51. By the Registry Acts for Middlesex, Yorkshire, Kingston-on-Hull, and Ireland (*d*), a memorial of (*inter alia*) every deed and conveyance whereby any hereditaments may be any way affected in law or equity, must be registered according to the Acts ; or such deeds and conveyances will be void against subsequent purchasers or mortgagees for value who register the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.

The Acts provide for the registration of the memorials and for the filing of every memorial in order of time as the same shall be brought to the office, and for the entry or registration of the memorials in the order in which they come to the hands of the registrar. The Irish Act of 1707 (*e*) and the Yorkshire Act of 1884 (*f*) contain the further important provision, that every deed or conveyance, a memorial whereof shall be duly registered, shall be good and effectual, both at law and in equity, according to the priority of time of registering the memorial.

The Acts do not extend to lands registered under the Land Transfer Acts, 1875 and 1897 (*g*), nor to copyhold estates (*h*), nor to any

(*b*) *Mayor of Carlisle v. Blamire*, 8 East, 487.

(*c*) *Moores v. Choat*, 8 Sim. 508 ; *Moore v. Greg*, 2 De G. & Sm. 304.

(*d*) Middlesex, 7 Anne, c. 20, and 54 & 55 Vict. c. 64 ; Yorkshire, 47 & 48 Vict. c. 54 ; and Ireland, 6 Anne, c. 2 ; further regulated by 2 & 3 Will. 4, c. 87, and 27 & 28 Vict. c. 76, and 54 & 55 Vict. c. 66.

(*e*) Section 4.

(*f*) Section 14.

(*g*) 38 & 39 Vict. c. 87, s. 127. The Irish Registration of Title Act, 1891 (54 & 55 Vict. c. 66), contains a similar exception.

(*h*) Middlesex Act of 1708, 7 Anne, c. 20, s. 17, Yorkshire Act of 1884, 47 & 48 Vict. c. 54, s. 28, Irish Act of 1707, 6 Anne, c. 2, s. 14.

leases at rack rent, or for a term not exceeding twenty-one years, where the actual possession and occupation go with the lease. It is, however, considered advisable (though not clearly necessary) to register leases of copyholds where leases of freeholds would be registered, the lease being a common law interest (*i*). Paragraphs
51—53

The Middlesex Act does not apply to the city of London, nor did it to any of the chambers in Serjeant's Inn or the Inns of Court or Chancery; but it still applies to those portions of the new county of London which formerly belonged to Middlesex (*k*), and it may be questioned whether it does not now apply to the site of Serjeant's Inn.

52. It was intimated (*l*), in a case which arose under the Irish Registry Act, that the exception in favour of leases not exceeding twenty-one years, where the actual possession goes with the lease, does not apply to a mere case of legal possession by receipt of the rents, but to such a possession only as is accompanied by occupation; because the object of the Act being to guard against secret conveyances, a visible occupation is not within the mischief, but is a substitute for registration; whereas legal possession only may be entirely unknown. In the Middlesex Act the expression is, "where the actual possession *and occupation* go along with the lease," and in the Yorkshire Act, "where accompanied by the actual possession from the making of such lease or assignment" (*m*). And when, by means of a mortgage, the possession and occupation are divided, it is proper to register the assignment of a beneficial lease; but not where the transaction is merely an assignment for valuable consideration, for then the possession and occupation still go with the lease (*n*). With respect to a doubt which has been raised (*a*), whether a lease originally at rack rent, but which by improvements or otherwise has since become valuable, be within the exception of the Act, it has been argued with force that it ought to remain so (*b*), because it ought not to be affected by matter *ex post facto*, or to vary with the value of the property.

53. The necessity for registration does not in Middlesex or Ireland arise in the case of a mere equitable mortgage by deposit, without memorandum, there being no instrument which can be registered (*c*); and a person who has a lien or other interest which needs no writing is not bound to obtain written evidence of it for the purpose of Equitable mortgages by deposit need not be registered in Middlesex or Ireland, but *aliter* in Yorkshire.

(*i*) Sugd. V. & P., 732, ed. 14.

(*k*) Ibid., 7 Anne, c. 20, s. 18.

(*l*) *Fury v. Smith*, 1 Huds. & Bro. 735.

(*m*) Section 28 of Act of 1884 (47 & 48 Vict. c. 54).

(*n*) Sugd. V. & P., 732, ed. 14; and Rigge on Registry, 88, note (*o*).

(*a*) Rigge on Registry, 88, note (*n*).

(*b*) Sugd. V. & P., 732, ed. 14.

(*c*) *Sumpter v. Cooper*, 2 B. & Ad. 223.

Paragraphs
53—54

registration (*d*). By the Yorkshire Act of 1884, however (*e*), it is enacted that where any lien or charge on any lands is claimed in respect of any unpaid purchase-money, or by reason of any deposit of title deeds, a memorandum of such lien or charge, signed by the person against whom it is claimed, may be registered, and unless it be registered no such lien or charge shall have any effect or priority as against any registered assurance for value. In all the Acts the word "conveyance" or "assurance," "mortgage," and other like expressions, are now held to refer to equitable as well as legal incumbrances, and to instruments not under seal, as well as to deeds (*f*); and a direction to prior mortgagees to hold the title deeds, subject to their own security, for the benefit of subsequent mortgagees, a memorandum of further charge, or other form of agreement for a mortgage, requires registration, as a document within the mischief of the Acts (*g*). An assignment of a sum of money charged upon land has been held not to require registration (*h*); and it appears to be only by a somewhat strained construction of the Acts that such an interest could be included in them. The decision, however, has been doubted, and it is said that in Ireland it is not relied upon in practice (*i*).

As to the effect of notice of fraud where the instrument has not been registered, see *infra* (1111).

SECTION III.

Of the Modes of Creating Mortgages of Freehold and Leasehold Land, the Title to which is registered under the Land Transfer Acts.

	PARAGRAPH
<i>Nature of statutory charges</i>	54
<i>Transfer of registered charges</i>	55
<i>Devolution of registered charges</i>	56
<i>Creation of equitable interests in registered land</i>	57
<i>Fraudulent and void registered charges</i>	58
<i>General comment on mortgages of registered land</i>	59
<i>Defects of statutory charges of land already registered</i>	60
<i>Difficulty where mortgage is required in order to complete a purchase</i>	61

Nature of
statutory
registered
charges.

54. The Land Transfer Act, 1875, after establishing a land registry and providing for the registration of landowners either with absolute or possessory titles, provides for the creation of a new kind of statutory mortgage called a registered charge. Under these provisions every

(*d*) *Kettlewell v. Watson*, 21 Ch. D. 685.

(*e*) 47 & 48 Vict. c. 54. Section 7. The section applies to deposits without memorandum. *Battison v. Hobson*, [1896] 2 Ch. 403.

(*f*) See *Fullerton v. Provincial Bank of Ireland*, [1903] A. C. 309.

(*g*) *Moore v. Culverhouse*, 27 Beav. 639. Notwithstanding *Wright v. Stanfield*, 27 Beav. 8; *Neve v. Pennell*, 2 H. & M. 170; 33 L. J. Ch. 19; *Re Wight's Mortgage Trust*, L. R. 16 Eq. 41; *Credland v. Potter*, L. R. 18 Eq. 350; L. R. 10 Ch. 8; and see Yorkshire Act, s. 3.

(*h*) *Malcolm v. Charlesworth*, 1 Keen, 63.

(*i*) *Dauids. Conv.* 2; 770 ed. 3.

registered proprietor of any freehold or leasehold land may in the prescribed manner charge such land with the payment at an appointed time of any principal sum of money either with or without interest (*k*). The charge is completed by the registrar entering on the register the person in whose favour the charge is made, as the proprietor of such charge, and the particulars of the charge; and the registrar, if required, must deliver to the proprietor of the charge a certificate of charge in the prescribed form (*l*), which is *prima facie* evidence of the several matters therein contained (*m*). In every such charge there is implied on the part of the person who is then registered proprietor of the land, his heirs, executors, and administrators (unless there be an entry on the register negating such implication), a covenant with the registered proprietor for the time being of the charge to pay the principal and interest, if any, at the appointed time and rate; and, if the principal or any part thereof be unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so much of the principal as for the time being remains unpaid (*a*). There are also implied (*b*) all the powers of sale, etc., conferred on mortgagees by ss. 19, 20 (except sub-secs. (1) and (4)), 21, 22, 23, and 24 of the Conveyancing and Law of Property Act, 1881.

Where the registered charge is created on leasehold land, there is further implied on the part of the then registered proprietor of the land, his heirs, executors, and administrators (unless there be a negative entry on the registry), a covenant with the registered proprietor for the time being of the charge, that the registered proprietor of the land at the time of the creation of the charge, his executors, administrators, and assigns, will pay, perform and observe the rents, covenants, and conditions of the original lease, and will keep the proprietor of the charge, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims on account of the non-payment of the rent, or any part thereof, or the breach of the said covenants and conditions, or any of them (*c*).

55. The registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. This Transfers of registered charges.

(*k*) There is a corresponding Act relating to Irish land, 54 & 55 Vict. c. 66, the provisions of which are with slight variations the same as the Land Transfer Act, 1875, but as it relates exclusively to Ireland and is believed to be but little used there, it has not been considered worth while to incumber this sub-section with its provisions. It supplants the Record of Title Act (Ireland), 1865, just as the Land Transfer Act, 1875, supplanted the Land Registry Act, 1862.

(*l*) 38 & 39 Vict. c. 87, s. 22; Land Transfer Rules, 1908, 158 to 181. Irish Act, 54 & 55 Vict. c. 66, s. 40 (3). If a certificate of charge be lost, mislaid, or destroyed, the registrar is empowered to issue a new one. Land Transfer Act, 1897, s. 8 (3), (4).

(*m*) Land Transfer Act, 1875, s. 80.

(*a*) Id. s. 23. (The Irish Act differs as to this, 54 & 55 Vict. c. 66, s. 40 (7).) Land Transfer Rules, 1908, 158 to 181.

(*b*) Land Transfer Act, 1897, 60 & 61 Vict. c. 65, s. 9 (2).

(*c*) Land Transfer Act, 1875, s. 24; Land Transfer Rules, 1908, 158 to 181.

Paragraphs
55—57

transfer is completed by the registrar entering on the register the transferee as proprietor of the charge transferred ; the registrar must, if required, deliver to the transferee a fresh certificate of charge ; but the transferor shall be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof (*d*).

Devolution of
registered
charges.

56. The executor or administrator of the sole registered proprietor, or of the survivor of several joint registered proprietors, and the trustee in the bankruptcy of the bankrupt registered proprietor of any charge, shall be entitled to be registered as the proprietor in the place of the former owner thereof (*e*).

Any person registered in the place of a deceased or bankrupt proprietor holds the charge upon the trusts and for the purposes to which the same is applicable by law, and subject to any unregistered estates, rights, interests, or equities, subject to which the deceased or bankrupt proprietor held the same ; but save as aforesaid he is in all respects (and in particular as respects any registered dealings with such land or charge), in the same position as if he had taken such land or charge under a transfer for a valuable consideration (*f*). The fact of any person having become entitled to any charge in consequence of the death or bankruptcy of any registered proprietor, has to be proved to the satisfaction of the registrar (*g*).

Creation of
other
equitable
interests in
registered
lands.

57. The registered proprietor of land alone can charge registered land by a registered statutory charge ; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as if the estate were not registered. In particular he may create an equitable mortgage by deposit of the land certificate (31). Any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land, may protect the same from being impaired by any act of the registered proprietor, by entering on the register such notices, cautions, inhibitions, or other restrictions as are mentioned in the Act.

The registered proprietor of a charge alone can transfer a registered charge by a registered disposition ; but, subject to the maintenance of his right, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land (*h*).

(*d*) Land Transfer Act, 1875, s. 40 ; Land Transfer Rules, 1908, 168, 179. Irish Act, 54 & 55 Vict. c. 66, s. 41.

(*e*) Id. ss. 42, 43 ; Land Transfer Act, 1897, Sched. I.

(*f*) Id. s. 46. See Irish Act, 54 & 55 Vict. c. 66, s. 76.

(*g*) Id. s. 47, Land Transfer Rules, 1908, 183 to 200.

(*h*) Id. s. 49.

Neither the registrar nor any person dealing with registered land or a charge is affected with notice of a trust, express, implied, or constructive; and references to trusts are so far as possible to be excluded from the register (*i*). Upon the registry of two or more persons as proprietors of the same charge, an entry may, with their consent, be made on the register to the effect that, when the number of such proprietors is reduced below a certain specified number, no registered disposition of such charge shall be made, except under the order of the court, or of the Registrar after inquiry into title, subject to an appeal to the court (*a*).

Paragraphs
57—60
Trusts, &c.,
to be excluded
from register.

58. Subject to the provisions of the Act, with respect to registered dispositions for valuable consideration, any disposition of land, or of a charge on land, which if unregistered would be fraudulent and void, will, notwithstanding registration, be fraudulent and void in like manner (*b*).

Fraudulent
and void
registered
charges.

59. As registration of title on sale is now compulsory throughout the county of London, the above provisions are of the greatest importance. The general scheme of the Land Transfer Acts appears to have been that all mortgages should be equitable, viz. either (1) by the simple deposit of the land certificate with or without a memorandum (which creates a statutory equitable mortgage analogous to mortgages by deposit of title deeds (*b*)), or (2) by the formal statutory registered charge above referred to. Apart from the express transfer of the legal estate (under the decision in *Capital & Counties Bank v. Rhodes* (*c*), referred to below) these statutory registered charges are purely equitable mortgages, as they neither affect the legal estate, nor make the mortgagee the registered proprietor. On the other hand, it was decided in the above-mentioned case that except on the occasion of first registration of land and except on sale by a registered proprietor the Acts do not affect the legal estate, the registered proprietor not necessarily being the legal owner at all, but only a donee of a statutory over-residing power of passing the legal fee simple to a purchaser on sale. If therefore a legal mortgage of registered land be desired, something more than a registered charge must be insisted on.

General
comment
on registered
charges.

60. Where the title to the land is registered as absolute or qualified a statutory charge without the transfer of the legal estate would appear to be sufficient protection against the claims of prior incumbrancers; but, on the other hand, it would not confer on the mortgagee those rights as against tenants and third parties which are incidental to the legal ownership. It is also doubtful whether on foreclosure or

Suggestions
as to mort-
gages off regis-
tered land.

(*i*) Land Transfer Act, 1897, Sched. I.

(*a*) Land Transfer Act, 1875, s. 83 (3); Land Transfer Act, 1897, Sched. I. See Irish Act, s. 63.

(*b*) Land Transfer Act, 1875, s. 98.

(*c*) [1903] 1 Ch. 631.

Paragraph
60

ejectment the mere substitution of the mortgagee on the register as proprietor would confer the legal fee simple on him or make him any more than the donee of a statutory power to sell or mortgage, as ss. 26 and 30 of the Act of 1875 are by no means free from ambiguity as to this. Nor, where the mortgage is of property which necessitates elaborate covenants and provisions binding the mortgagor, is a statutory charge practically available without a collateral deed containing such covenants and provisions. It is sometimes also said that such a collateral deed is desirable even where the only covenants are for payment of principal and interest, on the ground that the statutory instrument of charge is retained by the registrar, and that it might be necessary to serve him with a *subpœna ducis tecum* if it were desired to sue the mortgagor on these covenants. This, however, appears to the editor not to be so, as the production of the certificate of charge is sufficient evidence of the charge, and the statute implies in every such charge the covenants in question. But where the title registered is merely possessory, then it is extremely important that the lender should have the protection of the legal estate if he wishes (*ex. gr.*, where the advance is made out of trust funds) to be in as safe a position as he would be under a regular legal mortgage of unregistered land, that is to say, where he desires to make quite sure of getting priority over possible equities, created before the first registration of the title, of which he may have no knowledge. This can be effected in two ways: (1) The lender can insist upon being registered as *proprietor of the land*, the right of redemption and other equities being regulated by a collateral deed kept off the register. In that case the collateral deed would bear the *ad valorem* mortgage stamp, and (on production of it, properly stamped, to the Registrar) the registered transfer would require no stamp (Land Transfer Rules, 1908, r. 123). Or (2) The borrower may remain the registered proprietor, merely executing in favour of the lender a registered charge, with words of grant added to it, or (instead of such words of grant) a collateral deed conveying the legal estate (*d.*). It must, however, be remembered that although such a collateral deed or such words of grant in the charge itself, pass the legal estate to the lender, yet if he is not registered as proprietor of the land, the person who is (*i.e.*, *ex hypothesi* the borrower), retains the statutory over-riding power of passing it to a purchaser on sale. In other words, if he were to sell his equity of redemption, the purchaser of that equity, as the new registered proprietor, would apparently become the legal owner; and consequently the lender would be divested of his legal estate, and presumably of the protection afforded by it. To prevent this (or rather to make sure that each successive purchaser of the equity of redemption shall revest the legal estate in the lender), it is usual to stipulate for a restriction being entered

(d) See *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631.

on the register against a transfer of the land without the consent of the chargee. Paragraphs
60—61

61. Where land is in a compulsory district, and a purchaser is borrowing money *in order to enable him to complete the purchase*, the matter becomes more complicated. If the vendor is already registered proprietor, it seems that the best course is for the lender to insist upon having the property transferred by the vendor direct to him as *registered proprietor*, the true nature of the transaction being recorded in a collateral deed. The statutory transfer will then be stamped *ad valorem* as a conveyance on sale and the collateral deed as a mortgage. If this be not done, then a registered charge must be given contemporaneously with the advance. If the registration of the new proprietor is not made contemporaneously with the advance, the statutory charge is nevertheless effective under r. 96 of the Land Transfer Rules, 1908 ; but a priority notice should be lodged at the registry under r. 95. A collateral deed will in any case be necessary, and if executed before registration it will have to be followed by a short indorsed conveyance of the legal estate.

Where the land has never been on the register the transaction becomes more complicated still. Section 20 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), enacts that, in a compulsory district, no person *taking under any conveyance on sale* executed after registration first becomes compulsory in that district, shall acquire the legal estate unless and until he is registered as proprietor. Consequently, unless a legal mortgage can be made *before the sale is completed* in favour of the person who is advancing part of the purchase-money, the latter will have to part with his money to the vendor on the faith of a mere equitable mortgage. For the purchaser does not get (and therefore cannot convey to the lender) the legal estate until he is himself registered as proprietor. And even where the arrangement is that the property shall be conveyed direct to the lender, he would not get the legal estate until he was registered as proprietor.

It is true that by r. 96 of the Land Transfer Rules, 1908, the purchaser may create a statutory charge in favour of a lender directly the instrument of transfer is executed and before registration ; and he may even make a statutory transfer in the lender's favour, and priority can be secured for both by a priority notice under r. 95. But a statutory charge is merely an equitable security, and a statutory transfer does not pass the legal estate until the transferee is registered as proprietor. This risk is perhaps not very serious. *Ex hypothesi* the legal title is a good one when the mortgage-money is paid, and the only risk is that, between that date and the registration of the purchaser (or the mortgagee) as proprietor, the vendor in whom the legal estate remains may create a legal mortgage or part with the legal estate to a prior undisclosed equitable incumbrancer. Seeing, however, that he would have parted with the deeds, and (the purchase-money

Peculiar difficulties where mortgage required to enable purchase to be completed.

Additional difficulties where land is about to be registered for first time.

Paragraph
61

Suggested
method of
keeping off
register
altogether.

having been paid) would be a mere bare trustee for the purchaser, that appears to be an almost negligible danger. It is conceived, therefore, that a mortgagee who insisted upon the land being transferred to himself direct, with a view to being registered as the first registered proprietor, would be perfectly safe. But if he does not do so, and merely relies on a statutory charge, no doubt he runs the risk of the purchaser neglecting to convey the legal estate to him when he (the purchaser) becomes registered proprietor. In order to avoid the risks (such as they are) above indicated, it has been suggested that the vendor should, by a voluntary deed, convey the legal estate to a trustee for himself, should subsequently convey the equitable estate to the purchaser, and that finally the latter and the trustee should mortgage by an ordinary mortgage deed to the lender, thus keeping the property off the register altogether. This method would appear, however, to be only applicable where the vendor is owner in fee. Moreover, if such a transparent device be effectual to pass the legal estate without registration (which seems by no means free from doubt), it is apprehended that a single deed by which the vendor should convey by the purchaser's direction to the lender by way of mortgage would be equally valid, much simpler, and applicable not merely to cases where the vendor is fee simple owner, but also to cases where he is mere donee of a power of sale, or a trustee. It would seem on the whole that the Land Transfer Acts, which were intended to simplify conveyancing, have only succeeded in making it (so far as mortgages are concerned) more elaborate and technical than ever.

CANADIAN NOTES

HOW TO CREATE A LEGAL MORTGAGE

As a general rule all persons who may be parties to any other contract may be mortgagors or mortgagees in a mortgage contract. Any property real or personal may be conveyed or assigned by a person to himself jointly with another person by the like means by which it might be conveyed or assigned by him to another person, and may in like manner be conveyed or assigned by a husband to his wife and by a wife to her husband alone or jointly with another person (*a*). Trustees may invest trust moneys in their hands in first mortgages on lands held in fee simple. This is provided by s. 2 of the Trustee Investment Act (*b*). The power of executors and trustees to mortgage the property of their testator is governed by ss. 16, 17, 18, 19 and 20, of the Trustee Act (*c*). Where a testatrix after a direction to pay her debts, devised land to her executor and trustee and his executors and administrators, upon trust to retain for his own use for life, and directed that after his decease his executors or administrators should sell the land and divide the proceeds among her children, it was held that this was a devise of the land out and out as to the legal estate, and the words "and his executors and administrators" being equivalent to "heirs and assigns" the executors had the right by virtue of s. 16 of the Trustee Act (*d*) to mortgage the entire fee for debts, and the mortgagee in such a mortgage made within eighteen months of the death was exonerated from all inquiry by s. 19 of the Act (*e*). The Devolution of Estates Act (*f*) does not apply to a case where the

(*a*) R. S. O. (1897), c. 119, s. 37.

(*b*) *Ibid.*, c. 130.

(*c*) *Ibid.*, c. 129.

(*d*) *Ibid.*, c. 129.

(*e*) *Mercer v. Neff* (1898), 29 Ont. 680.

(*f*) R. S. O. (1897), c. 127.

executor derives his title to the land from and acts under the will and the provisions of the Trustee Act (*g*). The devisee of real estate under the will of a testator subject to the Devolution of Estates Act and amendments has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested in the legal personal representatives. And where real estate devised by a will so subject to the Devolution of Estates Act of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was during such period mortgaged by the devisee in good faith, it was held that the mortgage was operative between the devisee and the mortgagee when made and became fully so as to the land and against the personal representatives when the year expired in the absence of any warning that was needed for their purposes (*h*). The extent to which a bank may be a mortgagee is governed by sections 76, *et seq.* of the Bank Act (*i*). A mortgage upon land given to secure indorsements upon negotiable paper to be made by the mortgagee for the benefit of the mortgagor becomes operative only upon the indorsements being made; and an assignment of such mortgage to a bank, before the making of the indorsements, is not a violation of s. 76 of the Bank Act, R. S. C. (1906), c. 29 (*k*). If a mortgage upon lands be given to a bank as security for future advances in contravention of the Banking Acts, and after the debt has been contracted or advances made another mortgage be executed upon the same property as additional security for the debt so contracted or advances made, the second mortgage will be valid (*l*); where the directors of a joint stock company are empowered to borrow moneys they may do so by mortgaging the property of the company (*m*). A municipal corporation

(*g*) *Mercer v. Neff* (1898), 29 Ont. 680.

(*h*) *Re M'Millan, M'Millan v. M'Millan* (1898), 29 Ont. 680.

(*i*) R. S. C. (1906), c. 29.

(*k*) *Re Essex Land and Timber Co., Trout's Case* (1891), 21 Ont. 367; and see *Lockwood v. M'Pherson* (1907), 6 W. L. R. 277.

(*l*) *Grant v. La Banque Nationale* (1885), 9 Ont. 411; *Canadian Bank of Commerce v. M'Donald* (1906), 3 W. L. R. 90; *Cleveland v. Boak* (1906), 1 E. L. R. 64.

(*m*) *Farrell v. Carribou Gold Mining Co.* (1897), 30 N. S. R. 199.

may take a mortgage from a manufacturer as security for the due performance of the conditions of a contract to carry on certain work (*n*). As a general rule any person not being under any disability and beneficially entitled to property may mortgage it to the extent of his interest therein. Coverture is no longer a disability since the passing of the Married Women's Property Act (*o*), in the case of a woman married since the first day of July, 1884, or in the case of property acquired by a married woman after that date. In Manitoba it has been held that a mortgage made by an Indian living on a Reserve of land in the Reserve is void (*p*); and see *Letourneau v. Carbonneau*, and *Malcolmson v. Malcolmson*, *post*, p. 350*d*.

A voluntary conveyance of land is void under 13 Eliz. c. 5 (Imp.), as tending to hinder and delay creditors, though the vendor was solvent when it was made, if it results in denuding him of all his property and so rendering him insolvent thereafter. A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realizing his security (*q*).

A mortgage otherwise void may be made valid by ratification, *Casler v. Grace Mining Co.* (1910), 15 O. W. R. 415.

Registering Mortgages.

The law and practice in the provinces of the Dominion is that known as registration of deeds. In Ontario the effect of registering deeds is given in sect. 87 of the Act respecting the registration of instruments relating to land, R. S. O. (1897), c. 136, and is as follows: After any grant from the Crown of lands in Ontario and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in the grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered in

(*n*) *Corporation of the village of Brussels v. Ronald* (1882), 4 Ont. 1.

(*o*) R. S. O. (1897), c. 163.

(*p*) *Black v. Kennedy* (1877), Man. R. 144.

(*q*) *Sun Life Assurance Co. v. Elliott* (1900), 31 S. C. R. 91; 7 B. C. 189 reversed; and see *Fraudulent Preferences*, *post*, p. 356*b*; and *Wade v. Elliott*, *post*, p. 670*c*; and *Definition*, *post*, p. 350*d*.

the manner herein directed, before the registering of the instrument under which the subsequent purchaser or mortgagee claims; and see *Re Ling and Dominion Coal Co.* (1908), N. S. 6 E. L. R. 264.

Form of Mortgage.

To effect a legal mortgage it is not necessary that the conveyance be in the form of a mortgage. It may be absolute in form, and provided it conveys the legal estate it will be sufficient to create a legal mortgage (*qq*).

It is advisable however to employ the appropriate word of conveyance, as, for example, "grant" where the mortgage is of freehold lands. But the use of technical words is no longer essential. By the Act respecting the Law and Transfer of Property (*r*) the word "convey" will effect a valid and sufficient assurance by way of mortgage. By the same Act it is no longer necessary in the limitation of an estate in fee simple to use the word "heirs." It will be sufficient to use the words "in fee simple" or any other words sufficiently indicating the limitation intended (*s*). But a conveyance intended to operate as a transfer of the legal estate is required to be under seal (*t*). Under the Land Titles Act (*u*), however, a registered owner may charge his land with the payment of money by instrument without seal: and by s. 37 the owner of a registered charge may enforce it by foreclosure or sale of the land, in the same way as if the land had been transferred to him by way of mortgage.

In the N. W. T. under the Land Titles Act (*x*) a mortgage may be created by an instrument not under seal simply charging the land with the payment of money. A mortgage under this Act does not operate as a transfer of the land, but only as a security, s. 98, and after default the mortgagee may sell or foreclose, s. 99.

(*qq*) *Beaton v. Wilbur* (1906), 1 E. L. R. 472; *Whitman v. Hiltz* (1906), 1 E. L. R. 68.

(*r*) R. S. O. (1897), c. 119, s. 1.

(*s*) Section 4, ss. 1, 2.

(*t*) Section 3.

(*u*) R. S. O. (1897), c. 138, s. 33. See Form No. 28 to the Act.

(*x*) R. S. C. (1906), c. 110.

A mortgage of land, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised belonging or in anywise appertaining or with the same demised, held, used, occupied and enjoyed or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands and of every part and parcel thereof and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever of the grantor in, to, out of or upon the same lands and every part and parcel thereof with their and every of their appurtenances (*y*).

M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form except that, immediately after the printed covenant for payment, the following words were inserted in writing: "It being understood however that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unerasd in its usual place, viz. after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for wrongful distress. It was held that M. was entitled to recover the amount distrained for with interests and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed and because it was in writing, and the words super-added in writing were entitled to have greater effect attributed to them than the printed clauses (*z*).

Where an incorporated company, having executed a bond which contained no direct words of charge but was evidently intended to give a lien on the property of the company, it was held that the lien was sufficiently created (*a*).

(*y*) R. S. O. (1897), c. 119, s. 12.

(*z*) *M-Kay v. Howard* (1883), 6 Ont. 135.

(*a*) *The Town of Dundas v. The Desjardins Canal Co.* (1870), 17 G. R. 27.

A deed poll to secure a sum of money, in which the words passing the estate were "mortgage all that certain parcel of land, etc., to have and to hold the aforesaid land unto the said J. R. his heirs, executors, administrators and assigns" was held sufficient to pass the right of possession to the grantee (b). In an instrument under seal the words "and for securing, etc. the said P. P. doth hereby specially bind, oblige, mortgage, and hypothecate the said piece or parcel of land, etc." pass no interest: and they only show an intention to create a charge or lien (c).

Under s. 5 of the Act respecting Mortgages of Real Estate (d) there shall be deemed to be included, and implied in every conveyance by way of mortgage, the following covenants by the person who conveys and is expressed to convey as beneficial owner, namely: (1) For payment of the mortgage money and interest and observance in other respects of the proviso in the mortgage. (2) Good title. (3) Right to convey. (4) That on default the mortgagee shall have quite possession of the land. (5) Free from all encumbrances. (6) That the mortgagor will execute such further assurances of the said lands as may be requisite. (7) That the mortgagor has done no act to incumber the land mortgaged. These covenants are according to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B to the Act respecting short forms of mortgages (e).

The insertion of the word "calendar" before the word "month" in the words given in column 1, No. 13 of the second schedule to the Short Forms Act, R. S. M. (1902), c. 157, does not prevent the mortgagee getting the benefit of the wording of the corresponding long form; and when the words of the short form above referred to are followed by the words "should default be made for two months a sale or lease may be made hereunder without notice." Held, that these words were effectual to enable the mortgagee to make a valid sale and

(b) *Vandelinder v. Vandelinder* (1864), 14 U. C. C. P.

(c) *Doe ex dem. Ross v. Papst* (1853), 8 U. C. R. 574.

(d) R. S. O. (1897), c. 121.

(e) R. S. O. (1897), c. 126.

conveyance of the whole estate mortgaged without giving any notice whatever of his intention to do so (*f*).

In a conveyance by way of mortgage of leasehold property, the following further covenant by the person who conveys and is expressed to convey as beneficial owner is implied, namely: That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid and effectual lease or grant of the land conveyed, and is in full force unforfeited and unsurrendered, and in nowise become void or voidable, and that all the rents reserved by and all the covenants, conditions and agreements contained in the lease, or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed and performed have been paid, observed and performed up to the time of conveyance. "And also that the person so conveying or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe and perform or cause to be paid, observed and performed all the rents reserved by and all the covenants, conditions and agreements contained in the lease or grant and on the part of the lessee or the grantee, and the persons deriving title under him to be paid, observed and performed and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all accidents, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them, by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions and agreements, or any of them (*g*). In a mortgage where more persons than one are expressed to convey as mortgagors or to join as covenantors, the implied covenants on their part shall be deemed to be joint and several covenants by them; and where there are more mortgagees than one the implied covenant with them shall be deemed to be a covenant with them jointly unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them

(*f*) *Re Cotter* (1904), 14 Man. L. R. 485.

(*g*) R. S. O. (1897), c. 121, s. 5.

shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him (*h*). The above sections apply only to mortgages made after the first day of July, 1886.

In the N. W. T. in every mortgage there shall be implied against the mortgagor remaining in possession a covenant that he will repair and keep in repair all buildings or other improvements erected and made upon the land, and that the mortgagee may at all convenient times, until the mortgagee is redeemed, be at liberty with or without surveyors or others to enter into or upon the land to view and inspect the state of repair of the buildings or improvements (*i*). An express covenant in a mortgage overrides and excludes an implied covenant (*k*).

A letter in the following form, "I agree to charge the east half of lot number 19 with the payment of the two mortgages amounting to \$750 and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said mortgages" is not a mere executory agreement but operates as a present charge in favour of mortgagees named upon the lands described and may be registered against them (*l*).

An equitable mortgagee by deposit of title deeds may obtain an order for sale (*m*).

A mortgage may be set aside on the ground of undue influence, or that the contract was an improvident one, *M'Gaffigan v. Ferguson* (1908), 5 E. L. R. 105; and see *M'Kin v. Ontario Bank*, *post*, p. 350*g*.

The onus of proving that there was no consideration for the mortgagor lies upon the mortgagor, *M'Long v. Cook* (1907), 6 W. L. R. 269; and *Lockwood v. M'Pherson* (1907), 6 W. L. R. 277; and see under Definitions, *post*, p. 350*d*.

(*h*) R. S. O. (1897), c. 121, s. 6.

(*i*) R. S. C. (1906), c. 110, s. 108.

(*k*) *Rithet v. Beaven* (1897), 5 B. C. R. 457.

(*l*) *Hoofstetter v. Booker* (1895), 22 O. A. R. 175; 26 S. C. R. 41.

(*m*) *Kerr v. Bebee* (1866), 12 Gr. 204.

MORTGAGE OF LEASEHOLD

It is doubtful whether the Act respecting Short Forms of Mortgages (*a*) can be safely employed in drawing a mortgage of lease. For the Act expressly provides that where the word "lands" occurs in the Act it shall extend to freehold lands and hereditaments (*b*), and this expressly does not include chattels real. It has been held that leaseholds will not pass under a general devise of real estate unless aided by other words (*c*).

The case of *Chittick v. Lowery* (1903), 2 O. W. R. 987, bears upon the construction of the Short Forms Act with regard to "releases all his claims upon said lands."

A lease was for a term of twenty-one years, with a covenant on the part of the lessor to grant to the lessee, his executors, administrators, or assigns, upon the expiration of that term, a renewal lease for a further term of twenty-one years. The lessee mortgaged the lease to the defendant company, reserving a reversion of one day, and the lessor endorsed upon the mortgage a consent to the assignment. The Supreme Court, reversing the judgment of the Court of Appeal and restoring that of Robertson, J., held that the mortgage effected an absolute assignment of the lease, and that the mortgagees were therefore liable for the payment of the rent and the performance of the covenants of the lease. *Jamieson v. The London and Canadian Loan and Agency Co.* (*d*). The same case came before the Supreme Court two years later, when it was held that the lessor having endorsed his consent to the assignment of the lease upon the mortgage must be taken to

(*a*) R. S. O. (1897), c. 126.

(*b*) Section 1.

(*c*) See Leith's Real Property Statutes, 419.

(*d*) 1897, 27 S. C. R. 435, reversing the judgment of Court of App. 23 O. A. R. 602.

have given also a consent to a reassignment upon payment of the mortgage debt, and it was held that the mortgagee of a lease may relieve himself from liability to the lessor on the assignment by way of mortgage with the latter's consent, by releasing his debt and reconveying the security (*e*).

Where the original lease contains a covenant not to assign or sub-let without leave and the lease has been assigned with the consent of the lessor, it cannot be reassigned to the original lessee without the lessor's consent. The long form of the covenant not to assign or sub-let without leave in the Act respecting short Forms of Leases (*f*) provides that the lessee and his assigns shall not during the term assign the premises unto any "person or persons whomsoever" without the consent of the lessor, and these words include the original lessee (*g*). Where the assignee of a lease subject to a mortgage thereof and of the rights of renewal and of purchase given by the lease exercises the right of purchase, the mortgage becomes a charge upon the fee, and the purchaser has no lien upon the fee for the amount of the purchase money in priority to the mortgage. The mortgagor and those claiming under him cannot assert title to the reversion as against the mortgagee (*h*).

The mortgagee of a term of years being in possession will at the suit of the mortgagor be restrained from felling timber even although he may have obtained the consent of the reversioner (*i*).

If owner leases and then mortgages, the mortgagee become the reversioner, *Anderson v. Stevenson, post*, 502*g*.

(*e*) *Jamieson v. London and Canadian Loan and Agency Co.* (1899), 26 O. A. R. 116; 30 S. C. R. 14.

(*f*) R. S. O. (1897), c. 125, Schedule B. (7).

(*g*) *Munro v. Waller* (1896), 28 Ont. 29.

(*h*) *Building and Loan Association v. McKenzie* (1897), 28 Ont. 316 affirmed 24 Ont. App. 599, 28 S. C. R. 407.

(*i*) *Chisholm v. Sheldon* (1850), 1 Gr. 318.

CHAPTER III.

Of Mortgages of Personal Chattels and Fixtures.

Section I.—Of such Mortgages generally.

„ II.—Of the effect of the Bills of Sale Acts on such Mortgages.

- SUB-SECT. (1). AS TO WHAT INSTRUMENTS FALL WITHIN THE ACTS.
 „ (2). AS TO THE MEANING OF “PERSONAL CHATTELS.”
 „ (3). CONDITIONS AND RESTRICTIONS, NON-COMPLIANCE WITH WHICH AVOIDS BILL AS AGAINST GRANTOR AND HIS CREDITORS.
 „ (4). ADDITIONAL CONDITIONS, NON-COMPLIANCE WITH WHICH AVOIDS BILL AS AGAINST GRANTOR'S CREDITORS.
 „ (5). HOW FAR BILL AVOIDED IN TOTO OR ONLY IN PART.

„ III.—Of the effect on such Mortgages of the Order and Disposition Clause in Bankruptcy.

SECTION I.

Of Mortgages of Personal Chattels generally.

	PARAGRAPH	Paragraph
<i>Writing not necessary in general</i>	62	62
<i>Written mortgages of chattels called bills of sale</i>	63	
<i>Effect of proviso that mortgagor shall remain in possession until default</i> ..	64	
<i>Mortgages of chattels not yet in existence</i>	65	
<i>Mortgage of incomplete chattels</i>	66	
<i>Mortgage of future acquired chattels</i>	67	
<i>How far mortgage of chattels affects others brought on to the same premises</i>	68	
<i>Mortgage of land usually passes fixtures</i>	69	
<i>Exceptions to mortgage passing fixtures</i>	70	
<i>Rule as to fixtures passing with land extends to leaseholds</i>	71	
<i>Meaning of fixtures</i>	72	
<i>Loose parts of fixtures pass along with them</i>	73	

62. Personal chattels may be the subject of securities, for the validity of which no deed in writing is necessary (*a*), and which may be made either by way of mortgage or by pledge (**81, 116**).

Writing not
necessary
generally to
securities on
personal
chattels.

(*a*) Litt. t. 365; *Reeves v. Capper*, 5 Bing. N. C. 136; *Flory v. Denny*, 7 Ex. 581.

Paragraphs
63—64
Mortgages of
chattels
commonly
called bills of
sale.

63. A mortgage of chattels, which, like an absolute assignment of them, is commonly called a bill of sale, passes the actual property in the goods to the mortgagee, subject to redemption. Moreover, where goods are already mortgaged or pledged, a second mortgage of them (*i.e.*, of the equity of redemption in them) is as good as it is in the case of lands (*b*). Like other mortgages it may be made subject to a condition; and the possession of the creditor is not, as in the case of a pledge, necessary for its validity (*c*). For many years it was considered fraudulent (*d*) for the debtor to continue in possession of the goods mortgaged, because he was thereby invested with a delusive credit arising out of such possession; and it was held in *Twyne's case* (*e*), soon after the passing of the statute against fraudulent deeds and alienations, that such possession was within the mischief aimed at by that Act. That rule still holds good in the case of absolute bills of sale, but the continuance of the grantor in possession under a *bonâ fide* conditional bill of sale given by way of security only, when consistent with the deed, is no longer regarded as even *primâ facie* evidence of fraud (*f*), although under the complicated regulations of the Bills of Sale Acts, and the order and disposition clause of the Bankruptcy Act, such continuance in possession may render such securities extremely hazardous.

Effect of
proviso that
mortgagor
shall remain
in possession
until default.

64. A proviso that the mortgagor of goods shall remain in possession until default, operates as a re-demise by the mortgagee, who cannot sue for the goods until default has been made, or until the expiration of the time limited where notice for payment is to be given upon default; and the mortgagor may maintain an action for interference with his possession during the term. Such a proviso, however, will not prevent the mortgagee from exercising an express power to take possession upon the happening of other contingencies though no default has been made. The re-demise only entitles the mortgagor to the use of the chattels, and if he or his trustee in bankruptcy sell them during the term, it will be a disclaimer of the tenancy, and the mortgagee or his assignees may sue in respect of the conversion (*g*). There may, however, be an express or implied licence to the mortgagor to deal with the goods in the way of his trade. So long as he does so, a *bonâ fide* purchaser from him will be protected; but if they be sold otherwise than in the ordinary

(*b*) *Usher v. Martin*, 24 Q. B. D. 272.

(*c*) *Maugham v. Sharpe*, 17 C. B. (N.S.) 443; 10 Jur. (N.S.) 989.

(*d*) *Per* Lord HARDWICKE, *Ryall v. Rolle*, 1 Atk. 167.

(*e*) 3 Co. 80.

(*f*) *Pennell v. Dawson*, 18 C. B. 355; *Martindale v. Booth*, 3 B. & Ad. 498; *Hale v. Metropolitan Saloon Omnibus Co.*, 28 L. J. Ch. 777; *Reed v. Wilmot*, 7 Bing. 577.

(*g*) *Fenn v. Bittleston*, 7 Ex. 152; *Brierley v. Kendall*, 17 Q. B. 937; *Exp. National Guardian Assurance Co., re Francis*, 10 Ch. D. 408.

course of business, the sale will be bad, though the purchaser bought *bonâ fide* and without knowledge of the fact (*h*). And if there be an express right to make use of the goods, though a licence to consume such of them as are perishable may be implied, they cannot be sold or otherwise dealt with as if there had been no grant (*i*).

Paragraphs
64—66

65. It is not necessary for the validity of a mortgage of chattels that the mortgagor should be aware of their exact nature (*k*). He may even, subject to the provisions of the Bills of Sale Acts hereinafter referred to, create a valid security upon personal property not yet in existence, provided he have a potential interest in that out of which the property may arise. Therefore, a parson may grant all the tithe wool which he may have in such a year, though perhaps he shall have none; and one possessed of land, the fruits which shall arise upon it, and the property shall pass as soon as the fruits are extant (*l*). So a valid mortgage may be made of the produce to arise from a whaling voyage then in course of prosecution (*m*); and of the freight to arise under a future contract in respect of an intended voyage (*n*); and future freight may be mortgaged with the ship (*o*), and it seems also separately from it, so that the separation be not permanent, but only for the purposes of the security (*p*). But it has been held that for want either of an actual or potential interest, a man cannot grant the wool that shall grow upon the sheep which he shall buy hereafter (*q*); but it seems difficult to reconcile this with the cases above cited or those referred to *infra* (67). An assignment of the profits of a ship has also been held not to pass at law the oil obtained on a voyage which was not contemplated at the date of the assignment (*r*), but there the oil was not referred to.

Mortgages of
chattels not
yet in
existence.

66. An incomplete chattel may also be the subject of a security comprising a contract to complete it, and to assign the materials appropriated for its completion, and the chattel when finished; and by such a contract the entire chattel and all things prepared for, though not actually attached thereto, will be bound, and will vest in the assignee (*s*).

Mortgage of
an incomplete
chattel.

(*h*) *National Mercantile Bank v. Hampson*, 5 Q. B. D. 177; *Taylor v. M'Keand*, 5 C. P. D. 358; *Payne v. Fern*, 6 Q. B. D. 620.

(*i*) *Gale v. Burnell*, 7 Q. B. 850.

(*k*) *Exp. Kelsall*, De G. 352.

(*l*) *Grantham v. Hawley*, Hob. 132; *Petch v. Tutin*, 15 Mee. & W. 110.

(*m*) *Langton v. Horton*, 1 Hare, 549.

(*n*) *Leslie v. Guthrie*, 1 Sc. 683.

(*o*) *Douglas v. Russell*, 4 Sim. 524; 1 Myl. & K. 488.

(*p*) *The Warre*, 8 Pr. 273, per Lord ELDON.

(*q*) *Grantham v. Hawley*, Hob. 132. An Act of S. Australia, 1855—1856, No. 4, authorizes liens on future wool and mortgages of cattle, etc., without delivery. See *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548.

(*r*) *Robinson v. Macdonnell*, 5 Mau. & S. 228.

(*s*) *Reid v. Fairbanks*, 1 C. L. R. 787; *Woods v. Russell*, 5 B. & Ald. 942.

Paragraphs
67—68

Mortgage of
future
acquired
chattels.

67. Upon the principle that specific performance would be decreed in equity of a contract to assign, when property which answers the description comes into the possession of the mortgagor, an assignment of chattels not in the mortgagor's possession at the date of the assignment will pass (but subject to the operation of the Bills of Sale Act, 1882) (118), an interest, which will attach upon such chattels as have been assigned by a sufficiently specific description, when they are acquired (*t*). So, a licence to seize the chattels under which, before the Judicature Acts, no interest would have passed until the chattels were seized by virtue of it, may, upon the construction of the instrument in which it is contained, operate as a present assignment (*u*). But until the property is acquired there is only a liability on a contract which is provable in the bankruptcy of the person who contracts, and from which he is released by the order of discharge (*v*).

Questions as
to how far
mortgages
of chattels
affect others
subsequently
brought on
to same
premises.

68. Questions whether and to what extent securities upon chattels were intended to affect more than the present property of the grantor, most frequently arise in mortgages of furniture and stock-in-trade, and of the machinery and fixtures contained in manufactories; the chattel or other nature of which latter has also been the cause of much discussion. In considering these questions, it may be premised that where property is purely of a movable nature, a clear intention must be expressed or implied in the security to affect such as is subsequently acquired or brought upon the mortgaged premises. Such an intention has been held to arise on a mortgage of farming stock and of the mortgagor's tenant right and interest yet to come and unexpired in the farm and premises, which

(*t*) *Holroyd v. Marshall*, 29 L. J. Ch. 655; 30 L. J. Ch. 385; 33 L. J. Ch. 193; *Reeve v. Whitmore*, 33 L. J. Ch. 63; *Lazarus v. Andrade*, 49 L. J. C. P. 847; *Leatham v. Amor*, 47 L. J. Q. B. 581; *Re D'Epineuil*, *Tadman v. D'Epineuil*, 20 Ch. D. 758.

Before the Judicature Acts a grant of goods not in existence or not then belonging to the grantor was inoperative at law unless the grant was ratified after the grantor had acquired the property. (*Lunn v. Thornton*, 1 C. B. 379; *Gale v. Burnell*, 7 Q. B. 850.) Such a ratification being sufficiently shown where the grantee took possession of the property with the consent of the grantor. (*Hope v. Hayley*, 5 El. & Bl. 830.) Otherwise a legal security upon such property could be created only by a licence to the creditor to take possession of it; by which licence, so long as it was not acted upon, no legal title passed; but when executed the mortgagee's title, if the property were sufficiently described, was as good as if he had been directly put into possession by the mortgagor himself. (*Congreve v. Evetts*, 10 Ex. 298; *Holroyd v. Marshall*, 10 H. L. C. 191; *Belding v. Read*, 3 H. & C. 955; 11 Jur. (n.s.) 547.) And an instrument intended to be an assignment, but void as such, might, if it contained apt words, be treated as a power to take possession of the after-acquired property. (*Hope v. Hayley*, 5 El. & Bl. 830.) A subsequent assignment by the mortgagor before the property had been seized by the first mortgagee amounted to a revocation of the licence. (*Carr v. Acraman*, 11 Ex. 566.)

But by the effect of the Judicature Act, 1873, s. 25 (11), the equitable doctrine stated in the text now prevails (see *Anon*, W. N. (1875), p. 203; *Anon*, W. N. (1876), p. 64.

(*u*) *Reeve v. Whitmore*, *supra*.

(*v*) *Collyer v. Isaacs*, 19 Ch. D. 342; followed *Wilmot v. Alton*, [1897] 1 Q. B. 17; a case of mortgage of future book debts.

latter words were held to include the tenant's interest in crops grown in future years of the term, as that which the tenant, but for the security, would have a right as tenant to collect during the term (x). But it is otherwise in the case of a mortgage of furniture or chattels in a house, with power for the mortgagee on default to enter and take all and every the goods, chattels, effects and premises (y), for none of these words point to future property. And *à fortiori* will thus be so, where the security is expressly confined to property then being on the premises (z). In these cases, moreover, the restrictive provisions of the Bills of Sale Acts must be borne in mind, as in all ordinary transactions of mortgagor and mortgagee, they render assignments of future chattels void.

Paragraph
68—69

69. A different consideration arises where the property, though a chattel, is either absolutely or in a qualified manner fixed to the land. Whatever is fixed to the land, or to the building which stands upon it, belongs to the land; and though this rule has been so far relaxed for the benefit of trade, that *as between landlord and tenant*, certain fixtures may be removed by the tenant during the term, the exception is confined to cases arising out of that relation, and does not apply where the person who annexes the fixture is the owner of the soil, whether he acquired it by descent or by purchase, and whether he annexed the fixtures for a permanent purpose and for the better enjoyment of the land, or for the purposes of trade or manufacture (a). Therefore, as a general rule, by the mortgage of land or of a building, whether in fee or by demise (b), not only all fixtures annexed to it at the date of the security (c), but also all those which are afterwards annexed *by the mortgagor*, whether they be or be not trade fixtures or removable as between landlord and tenant (d), will vest in the mortgagee (e) though the mortgagor continue in possession, and will not pass to the trustee in bankruptcy

Mortgage of
land usually
passes
fixtures.

(x) *Petch v. Tutin*, 15 Mee. & W. 110.

(y) *Tapfield v. Hillman*, 6 Man. & Gr. 245; 6 Scott, N. R. 967.

(z) *Exp. Stephenson*, 12 Jur. 6.

(a) *Fisher v. Dixon*, 12 Cl. & Fin. 312; *Mather v. Fraser*, 2 K. & J. 536; *Exp. Cotton, re Nutter*, 2 Mont. D. & De G. 725; *Climie v. Wood*, L. R. 3 Ex. 257; L. R. 4 Ex. 328; *Cullwick v. Swindell*, L. R. 3 Eq. 249.

(b) *Southport and West Lancashire Banking Co. v. Thompson*, 37 Ch. D. 64.

(c) *Place v. Fagg*, 4 Man. & Ry. 277; *Colegrave v. Dias Santos*, 2 B. & C. 76; *Exp. Bentley*, 2 Mont. D. & De G. 591; where trade fixtures passed under the word "appurtenances."

(d) *Walmsley v. Milne*, 6 Jur. (N.S.) 125; 7 C. B. (N.S.) 115; *Exp. Reynal, re Gye*, 2 Mont. D. & De G. 443; *McChuney v. Lemon*, Hayes, 154; *Exp. Belcher*, 4 Dea. & C. 703; *Ackroyd v. Mitchell* 3 L. T. (N.S.) 236; *Exp. Broadwood*, 1 Mont. D. & De G. 631; *Exp. Cowell*, 12 Jur. 411; *Exp. Price*, 2 Mont. D. & De G. 518; *Tottenham v. Swansea Zinc Ore Co.*, 52 L. T. 738.

(e) *Meux v. Jacobs*, L. R. 7 H. L. 481; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Havtry v. Butlin*, L. R. 8 Q. B. 290; *Cross v. Barnes*, 46 L. J. Q. B. 479; *Smith v. Maclure*, 32 W. R. 459; *Ellis v. Glover and Hobson*, [1908] 1 K. B. 388.

Paragraphs
69—70

of the latter (*f*). This consequence will follow, independently of any inference as to the non-ownership of the bankrupt arising from the custom of a particular trade that the fixtures shall be furnished by and continue to be the property of the owner of the land (*g*). It is no ground of objection to this rule that the fixtures were erected by a partnership firm, to one member of which the mortgaged property exclusively belonged, the mortgagee not being concerned with the equities between the partners (*h*). On the other hand, where, by custom, trade fixtures belong to the tenant of the mortgagor, the mortgagee cannot claim them as against the tenant (*i*); and a mortgagor *while in possession* may permit trade fixtures to be put up and removed, so long as he does not either materially diminish the mortgagee's security, or commit a breach of some express stipulation in the mortgage (*k*). But the exception as to trade fixtures in favour of a tenant does not apply in the case of fixtures erected on the mortgaged premises under a "hire-purchase agreement," on the terms that, until paid for, they shall continue the property of the manufacturers who supplied them. In such cases if the mortgage is a legal mortgage and the mortgagee had no notice of the hire-purchase agreement (*l*), or the latter was made subsequently to the mortgage, the title of the mortgagee will prevail over that of the manufacturer by virtue of his legal title unless the mortgagee has acquiesced in their removal (*m*). But where the mortgage is an equitable mortgage, and is given after the hire-purchase agreement, then, even if the mortgagee takes without notice of it, his title is postponed to that of the manufacturer (*n*).

Exceptions
where
fixtures
do not pass
by mortgage
of the land.

70. The general rule as to fixtures is subject to qualifications arising out of the terms of the security. As if two kinds of property be mortgaged, and the fixtures be expressly included in one of them, the principle *expressio unius est exclusio alterius* may exclude the fixtures annexed to the other. For instance, a mortgage (*o*) of a foundry and of dwelling-houses, with the bells and other fixtures in

(*f*) *Clark v. Crownshaw*, 3 B. & Ad. 804.

(*g*) See *Rufford v. Bishop*, 5 Russ. 346.

(*h*) *Exp. Scarth*, 1 Mont. D. & De G. 240; *Exp. Cotton, re Nutter*, 2 Mont. D. & De G. 725; *Cullwick v. Swindell*, L. R. 3 Eq. 249.

(*i*) *Sanders v. Davis*, 15 Q. B. D. 218; 54 L. J. Q. B. 576.

(*k*) *Ellis v. Glover and Hobson*, [1908] 1 K. B. 388.

(*l*) *Re Samuel Allen and Sons, Ltd.*, [1907] 1 Ch. 575.

(*m*) *Hobson v. Gorrings*, [1897] 1 Ch. 182, distinguishing *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415; and *Gough v. Wood*, [1894] 1 Q. B. 713; 70 L. T. 297; *Reynolds v. Ashby and Son, Ltd.*, [1904] A. C. 466. Conf. *Lyon and Co. v. London City and Midland Bank*, [1903] 2 K. B. 135.

(*n*) *Re Samuel Allen and Sons, Ltd.*, [1907] 1 Ch. 575.

(*o*) *Hare v. Horton*, 5 B. & Ad. 715. But *quære* whether this would not be too refined a distinction to be followed in these days.

the houses, was held to exclude a steam engine and machinery in the foundry, which otherwise would clearly have passed by the mere conveyance of the foundry; but the bare enumeration of specific fixtures in the mortgaged property will not rebut the inference that all fixtures were intended to pass (*p*). Again, if it be the custom of the place that fixed machinery which can be removed without injury to the freehold should be so removed, and it has been treated between the parties as separate from the land and unaffected by the mortgage, such machinery may be held not to pass (*q*) by a mortgage of the buildings and machinery. But this distinction is admitted with great caution, and was held not to have arisen by a mere mortgage of a factory to one, followed by a separate mortgage of the machinery contained in it to another (*r*).

71. The rule as to the vesting of fixtures in the mortgagee of the buildings or soil to which they are annexed, extends to mortgages of leasehold as well as of real estate (*s*); and the right of the mortgagee to fixtures both existing and added, and whether removable or not as between landlord and tenant, and whether the property be real or leasehold, arises under an equitable mortgage by deposit (**26**), as well as under a legal mortgage, and whether with the deposit there be a memorandum not mentioning the fixtures, or no memorandum (*a*). Where a deposited lease having expired, an agreement was made for a new lease which was not granted, the security was held to remain on the produce of the fixtures (*b*). And the right of the mortgagee of a lessee to sever the mortgaged fixtures from the freehold is a right or interest within the rule laid down by Lord Coke (*c*) as to a surrender of a lease: that “having regard to the parties to the surrender, the estate is absolutely drowned. But having regard to strangers who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in law a continuance.” The mortgagee may therefore enter and sever the fixtures notwithstanding the surrender of the term (*d*).

Rules as to
fixtures
passing with
land, extends
to leaseholds.

(*p*) *Mather v. Fraser*, 2 K. & J. 536; and for the effect of words relating to machinery to be added, see *Metropolitan Counties, etc., Society v. Brown*, 26 Beav. 454; *Haley v. Hammersley*, 3 De G. F. & J. 587.

(*q*) *Trappes v. Harter*, 2 Cr. & M. 153; and see *Waterfall v. Penistone*, 3 Jur. (N.S.) 17; 6 El. & Bl. 876.

(*r*) *Whitmore v. Empson*, 23 Beav. 313; 3 Jur. (N.S.) 230.

(*s*) *Longstaff v. Meagoe*, 2 Ad. & El. 167; *Exp. Broadwood*, 1 Mont. D. & De G. 631; *Exp. Barclay, re Gawan*, 5 De G. M. & G. 403.

(*a*) *Exp. Price*, 2 Mont. D. & De G. 518; *Exp. Barclay, re Gawan*, 5 De G. M. & G. 403; *Exp. Cowell*, 12 Jur. 411; *Exp. Broadwood, supra*; *Exp. Tagart*, De G. 531; *Exp. Heathcoat*, Fonbl. Bkey. R. 42; *Exp. Edwards*, Fonbl. Bkey. R. 208; *Williams v. Evans*, 23 Beav. 239; *Longbottom v. Berry*, L. R. 5 Q. B. 123.

(*b*) *Fearenside v. Derham*, 13 L. J. Ch. 354.

(*c*) Co. Lit. 378 b.

(*d*) *London and Westminster Loan and Discount Company v. Drake*, 5 Jur. (N.S.) 1407.

Paragraph
72

Meaning of
fixtures.

72. As to the extent of the term “fixtures” (*e*), whatever is of itself sunk or is built into any fabric which is sunk into the ground, or is fixed by cement, mortar, screws, solder or other permanent fastening to any such fabric, or to any part of the building itself, either above or below, and although it may be removed without injury to the building (unless it has been agreed or can be inferred from the acts of the parties that it shall be severable (*f*)), is considered to be annexed to the land. Such may be a steam engine, steam hammer, engine boiler, cross shafting in a factory and the belts connecting it with other machinery (*g*), furnace of fire brick and iron, coke oven, still, malt mill, gas fittings, straightening plates laid on brickwork and bedded in the earth, so as to form part of the floor, rails fixed to sleepers embedded in ballast (*h*), and other fixed machinery (*i*); and even gold and silver absorbed into the brickwork of a smelting furnace (*k*). But a bed plate only laid upon and not fixed to a foundation sunk in the ground, cutters kept in places by wedges, cisterns, and generally such articles as are kept in place by their own weight only, though resting upon foundations fixed to the soil, do not pass (*l*), unless they have during the existence of the mortgage been substituted for similar articles which were fixtures, *ex. gr.*, where “dog-grates” not physically fixed to the structure of a house were substituted for ordinary fire grates which were so fixed (*m*).

Neither do such articles pass, as, though partly embedded in the soil, or screwed or nailed to the fabric of a building have not been so placed in order to fix them permanently; as for instance carpets nailed to a floor, or seats screwed to the floor of a theatre in compliance with the rules of a local authority merely to prevent them

(*e*) See *Smith v. Maclure*, 32 W. R. 459, as to what securities upon fixtures require registration under the Bills of Sale Act (87).

(*f*) *Lancaster v. Eve*, 5 C. B. (N.S.) 717. And see *Exp. Moore and Robinson's Banking Co.*, 14 Ch. D. 379, and *Reynolds v. Ashby and Son, Ltd.*, [1904] A. C. 466; and as to gas engines, *Hobson v. Gorrings*, [1897] 1 Ch. 182; *Crossley Bros. Ltd. v. Lee*, [1908] 1 K. B. 86.

(*g*) *Sheffield and South Yorkshire, etc., Building Society v. Harrison*, 15 Q. B. D. 358.

(*h*) As to the apparatus for the manufacture of gas and as to gas meters, *The Queen v. Inhabitants of Lee*, L. R. 1 Q. B. 241.

(*i*) *Mather v. Fraser*, 2 K. & J. 536; *Haley v. Hammersley*, 3 De G. F. & J. 587; *Walmsley v. Milne*, 6 Jur. (N.S.) 125; 7 C. B. (N.S.) 115; *Metropolitan Counties, etc., Society v. Brown*, 26 Beav. 454; *Horn v. Baker*, 9 East, 215; *Ackroyd v. Mitchell*, 3 L. T. (N.S.) 236; *Exp. Astbury, Exp. Lloyds Banking Co.*, L. R. 4 Ch. 627, 637; *Turner v. Cameron*, L. R. 5 Q. B. 306; *Cross v. Barnes*, 46 L. J. Q. B. 479.

(*k*) *Tottenham v. Swansea Zinc Ore Co.*, 52 L. T. 738.

(*l*) *Metropolitan Counties, etc., Society v. Brown*, *supra*; *Mather v. Fraser*, *supra*. See *Exp. Astbury, Exp. Lloyds Banking Co.*, L. R. 4 Ch. 630; and *Longbottom v. Berry*, L. R. 5 Q. B. 123 (approved in *Sheffield and South Yorkshire, etc., Building Society v. Harrison*, *supra*), for other machinery there decided to be fixtures, and for particular things which have been held to come within the denomination of fixtures. See Grady on Fixtures and *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.

(*m*) *Monti v. Barnes*, [1901] 1 Q. B. 205.

being moved by the audience (*n*). Similarly straightening plates, which have accidentally penetrated the ground, or sleepers and trams which have become sunk into it by the weight of waggons passing over them are not fixtures (*o*) ; nor yet looms, the legs of which are dropped into sockets in the floor of the mill for steadiness only ; for besides that they are unfixed and no part of the mill, they are also in the nature of mere furniture, liable to be changed according to the purpose to which the mill and the fixed machinery in it may from time to time be applied (*p*). But it is otherwise if they be nailed down to plugs driven through the pavement (*q*).

Paragraphs
72—73

73. Moreover, with any fixture will pass (*r*), without special mention, whatever, though accidentally detached from it, or not of its own nature a fixture, may be essential for the proper employment of the machine or fixed article of which it forms part, even though it be more or less capable of use in a detached state. Such may be the stone of a mill removed for the purpose of repair, or the anvil of a steam hammer. The same rule is also applicable in the case of machinery not of a fixed kind ; so that such separate adjuncts of a machine as are necessary for its operation or intended to be used as part of it will pass with it, provided they have been actually fitted to their respective positions (*s*). And on the same principle a mortgage of a ship at sea with its tackle and appurtenances will pass a chronometer then on board belonging to the owner of the ship (*t*).

Loose parts
of fixtures
pass along
with them.

SECTION II.

Of the Effect of the Bills of Sale Acts on
Mortgages of Personal Chattels.

	PARAGRAPH
<i>Securities on chattels are usually created either by pledge or bill of sale</i>	.. 74
<i>Bills of Sale Acts only apply to written documents and not to pledges</i>	.. 75
<i>General effect of the Bills of Sale Acts</i>	.. .. 76

SUB-SECTION (1).—*As to what instruments given by way of security
for money fall within the Acts.*

<i>The Acts do not comprise every written security on chattels</i>	.. .. 77
<i>Meaning of “ Bill of Sale ” for purposes of the Acts</i>	.. .. 78
<i>Specified instruments only bills of sale if intended to pass or record the transfer of property</i>	.. .. 79

(*n*) *Lyons and Co. v. London City and Midland Bank*, [1903] 2 K. B. 135.
(*o*) *Metropolitan Counties, etc., Society v. Brown*, 26 Beav. 454 ; *Bates v. Duke of Beaufort*, 8 Jur. (N.S.) 270.
(*p*) *Hutchinson v. Kay*, 23 Beav. 413.
(*q*) *Boyd v. Shorrocks*, L. R. 5 Eq. 72 ; *Holland v. Hodgson*, L. R. 7 C. P. 328.
(*r*) *Place v. Fagg*, 4 Man. & Ry. 277 ; *Mather v. Fraser*, 2 K. & J. 536 ; *Fisher v. Dixon*, 12 Cl. & F. 312.
(*s*) *Cort v. Sagar*, 3 H. & N. 370 ; *Exp. Astbury, Exp. Lloyds Banking Co.* L. R. 4 Ch. 630.
(*t*) *Langton v. Horton*, 6 Jur. 911.

SUB-SECTION (1).—*continued.*

	PARAGRAPH
<i>Hire-purchase agreements are not bills of sale</i>	80
<i>Sham hire-purchase agreements may be</i>	81
<i>Attornment clauses when considered bills of sale</i>	82
<i>Exceptions from the statutory definition of bills of sale</i>	83

SUB-SECTION (2).—*As to the meaning of “personal chattels” under the Bills of Sale Acts.*

<i>Bills of sale do not fall within the Acts unless they relate to personal chattels as defined by the Acts</i>	84
<i>Statutory definition of personal chattels</i>	85
<i>Exceptions from the definition of personal chattels</i>	86
<i>Questionable whether fixtures attached to copyholds are within the exceptions</i>	87
<i>What constitutes a “separate assignment” of crops or fixtures so as to make them personal chattels</i>	88
<i>Trade machinery if in fact a fixture and not made severable by the mortgagee is not a personal chattel within the Acts</i>	89

SUB-SECTION (3).—*Conditions and restrictions compliance with which is essential to the validity of a bill of sale given by way of security for money as against the grantor and his creditors.*

<i>Conditions essential to the validity of a bill of sale</i>	90
<i>Object of the statutory form</i>	91
<i>What is sufficient compliance with statutory form</i>	92
<i>If the statutory form cannot be complied with the security cannot be given</i> ..	93
<i>Statutory form does not apply to attornment clauses</i>	94
<i>Principal decisions as to compliance with statutory form</i>	95
<i>What stipulations for maintenance and defeasance of security are allowed to be added to the statutory form</i>	96
<i>Covenants which have been disallowed</i>	97
<i>What powers of sale are allowed</i>	98
<i>What omissions from statutory form are allowed</i>	99
<i>Collateral documents adding to provisions of a bill not allowable</i>	100
<i>Bills to secure less than 30l.</i>	101
<i>What is sufficient statement of the consideration</i>	102
<i>Attestations of the bills of sale</i>	103
<i>Registration now essential to all bills given as security for money</i>	104
<i>Registration no longer a protection if goods left in grantor’s order and disposition at date of his bankruptcy</i>	105
<i>The manner of registering bills of sale</i>	106
<i>What is a sufficient copy for purposes of registration</i>	107
<i>Contents of statutory affidavit</i>	108
<i>Certificate of registration not conclusive evidence of completeness of affidavit</i>	109
<i>Local registration outside London</i>	110
<i>Extension of time for registering bills of sale</i>	111
<i>Provisions as to keeping and inspecting register, etc.</i>	112
<i>Renewal of registration necessary every five years</i>	113
<i>Registration of transfer of bills is not required</i>	114

SUB-SECTION (4).—Additional conditions, non-compliance with which avoids a bill of sale given by way of security for money as against the grantor's creditors but not as against the grantor himself. Paragraphs 74—75

<i>Bills void as against creditors in respect of personal chattels not specified and those of which grantor was not true owner</i>	115
<i>What amounts to specific description</i>	116
<i>What amounts to true ownership</i>	117
<i>Bill of sale of future acquired chattels</i>	118
<i>Bill of sale of chattels not belonging to grantor</i>	119

SUB-SECTION (5).—How far a bill of sale is avoided in toto by the Acts or only in part.

<i>Under what circumstances bill void only as regards personal chattels comprised in it</i>	120
<i>Under what circumstances totally void</i>	121
<i>Even where bill of sale totally void the entire document which contains it is not necessarily so</i>	122
<i>Necessity of putting collateral securities in separate instruments</i>	123

SECTION II.

Of the Effect of the Bills of Sale Acts on Mortgages of Personal Chattels.

74. As above stated, a mortgage of personal chattels may generally (with certain exceptions such as ships) be made by parol; but in practice such securities, other than pledges or pawns, are almost invariably reduced into writing, owing to the extreme danger attendant upon a security depending on the good memory, good faith, and continued existence of the mortgagor. Securities on chattels are usually created either by way of pledge or bill of sale.

75. The Acts which are now about to be considered, so far as they relate to securities on chattels (for the principal Act of 1878 is not confined to securities (a)), only apply to securities in writing. They affect documents and not transactions (b); and therefore pledges (c) and liens (d) not depending on written documents, are outside the Acts altogether, even when accompanied by collateral instruments regulating the rights of the parties (c). Bills of Sale Acts only apply to written securities and not to pledges.

Owing to the complicated nature of the Bills of Sale Acts, the law Present section

(a) *Cookson v. Swire*, 9 App. Cas. 653.
(b) *North Central Wagon Co. v. Manchester, Sheffield, and Lincolnshire Rail. Co.*, 35 Ch. D. 191, affirmed (*sub. nom. Manchester, Sheffield and Lincolnshire Rail. Co. v. North Central Wagon Co.*), 13 App. Cas. 554; and *Exp. Hauxwell, re Hemingway*, 23 Ch. D. 626.
(c) *Exp. Hubbard, re Hardwick*, 17 Q. B. D. 690; *Exp. Close, re Hall*, 14 Q. B. D. 386 (but see as to this case *Exp. Parsons, re Townsend*, 16 Q. B. D. 532); *Grigg v. National Guardian Assurance Co.*, [1891] 3 Ch. 206.
(d) *Re Vulcan Ironworks Co.*, W. N. (1888), 37.

Paragraphs
75—76

limited to
bills of sale
given by
way of
security
since 1882.

on the subject has assumed a highly special character, and several excellent treatises on the Acts have been published extending to some hundreds of pages of small type. The present editor has, therefore, come to the conclusion that it would be impossible to treat the subject exhaustively, without unduly enlarging this work, and that, having regard to the special treatises above referred to, any attempt to do so would not be of any great use to the profession. He has, therefore, designedly restricted the present section to a general statement of the effect of the Acts, and of the principal decisions upon them, and has confined that statement to bills of sale given *by way of security for money* since the 1st of November, 1882, on which day the Bills of Sale Act came into operation. For the law relating to bills of sale given otherwise than by way of security for money, and to bills of sale given by way of such security prior to that date, the reader is referred to special treatises on the Acts.

Existing
Acts.

76. The existing Bills of Sale Acts are the Acts of 1878, 1882, 1890, and 1891. The Act of 1878 is usually called the principal Act, but the Act of 1882 (which relates exclusively to bills of sale given by way of security for money) so completely revolutionized the law of mortgage of personal chattels that, for the purpose of this work, it is really more important than the Act of 1878. The Act of 1890, as amended by the Act of 1891, merely exempted certain commercial hypothecations from the operation of the Acts altogether.

General
effect of
Bills of Sale
Acts.

Speaking broadly, so far as the subject of this work is concerned, the Bills of Sale Acts (1) avoid certain written instruments, (2) so far as they purport to create a security on personal chattels for the payment of money, unless (3) they comply with the conditions imposed by the Acts. It is desirable to consider these three questions separately.

SUB-SECTION (1).—As to what Instruments given by way of security for money fall within the Bills of Sale Acts.

The Acts do
not comprise
every written
security on
chattels.

77. It must not be assumed that every instrument which creates a security on personal chattels for the payment of money necessarily falls within the provisions of the Acts. To bring such an instrument within the Acts, it must (1) be a bill of sale within the statutory definition; and (2) must relate to personal chattels within the statutory definition. Moreover, the Acts specially exempt certain classes of bills of sale from their operation; and in addition to the statutory exemptions the decisions of the courts have exempted certain other instruments not specially mentioned in the Acts.

78. For the purposes of the Bills of Sale Act, 1882, then, the expression "bill of sale" includes any of the following classes of documents, whereby the holder or grantee acquires a title to (e), or gets power, either with or without notice, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale (f), viz. :—

Paragraphs
78—79

Meaning of
"bill of sale"
under the
Acts.

(a) Bills of sale, assignments, transfers, inventories of goods with receipts thereto attached, receipts for purchase-moneys of goods, and other assurances of personal chattels (f) given by way of security for money.

(b) Declarations of trust of personal chattels without transfer (f) given for the same purposes.

(c) Powers of attorney, authorities or licences to take possession of personal chattels *as security for any debt* (f).

(d) Any agreement, whether intended or not to be followed by any other instrument by which a right in equity to any charge or security for moneys or personal chattels shall be conferred (a).

(e) Certain attornments giving or implying powers of distress are also to be deemed to be bills of sale to a certain extent, but as that provision is somewhat special it is treated separately, *infra* (82).

79. It must be carefully borne in mind that every instrument of the kind specified in paragraphs (a), (b), (c), and (d) given by way of security for money, is not necessarily a bill of sale within the Acts, unless it was intended by the parties to be a document passing the property in the goods, or giving the power to seize them, or to be a record of the transfer (b). Therefore a collateral instrument executed on the occasion of a pledge, regulating the rights of the parties, is not a bill of sale (c); nor is a delivery order to a warehouseman to deliver goods to a lender, in pursuance of a parol charge on such goods (d); nor is an agreement regulating the rights of borrower

Even
instruments
above
specified only
fall within
Acts if
intended to
pass or
record the
transfer of
the property.

(e) See *Ramsay v. Margrett*, [1894] 2 Q. B. 18; *Clapham v. Ives*, 91 L. T. 69.

(f) Act of 1878, s. 5, and see *Exp. Parsons, re Townsend*, 16 Q. B. D. 532.

(a) Act of 1878, s. 4. But where an unregistered agreement is followed by a properly executed or registered bill given in pursuance of it, the latter is good, although the agreement would, by itself, have been void. *Exp. Hauxwell, re Hemingway*, 23 Ch. D. 626.

(b) *Marsden v. Meadows*, 7 Q. B. D. 80; *Manchester, Sheffield, and Lincolnshire Rail. Co. v. North Central Wagon Co.*, 13 App. Cas. 554; *Charlesworth v. Mills*, [1892] A. C. 231; *Ramsay v. Margrett*, [1894] 2 Q. B. 18; *Clapham v. Ives*, 91 L. T. 69.

(c) *Exp. Hubbard, re Hardwick*, 17 Q. B. D. 690; *Hilton v. Tucker*, 39 Ch. D. 669; *Exp. Close, re Hall*, 14 Q. B. D. 386; but cf. *Charlesworth v. Mills*, *supra*, where *Exp. Hubbard, re Hardwick* was distinguished, and *Exp. Parsons, re Townsend*, 16 Q. B. D. 532, where the *ratio decidendi* in *Exp. Close, re Hall*, was disapproved.

(d) *Grigg v. National Guardian Assurance Co.*, [1891] 3 Ch. 206.

Paragraphs
79—80

and lender in relation to furniture warehoused as security for the debt (e); nor an agreement between a manufacturer and his agent that advances made by the agent should be covered and secured by the stock of goods which should be in his hands (f); nor a mere receipt for money payable under an oral contract complete before the receipt was given and not reduced into writing by the receipt (g). The test is, was there a bargain independently of the document? or is the document merely an acknowledgment of money paid in a transaction otherwise concluded (h)? for none of these documents pass the property.

Where, however, any document falling under paragraphs (a), (b), (c), or (d), other than a bill of sale in the strict sense, is given by way of security for money, it would seem that it must now be in any event void, because it cannot possibly be made in compliance with the statutory form prescribed by s. 9 of the Act of 1882 (i).

It must also be noted that the instruments referred to in paragraph (c) (powers of attorney, etc.), are only bills of sale if given as security for debts. Consequently the Acts do not apply to a power for a lessor to re-enter on default in the performance by a builder of his contract, and to take as the lessor's own property the materials on the ground, no security for a debt being thereby created (k). But the lessor may be defeated under the law relating to reputed ownership (124) if he fails to enter before the lessee's bankruptcy (l); and a mortgage by a lessee under a building lease providing that all building materials when brought in the premises should be considered as attaching to the land, with power to seize, etc., is void as a bill of sale.

Hire-
purchase
agreements
not bills of
sale.

80. An important class of instruments, which do not fall within the Acts, are those known as "hire-purchase agreements," by which a tradesman or manufacturer agrees to hire out a chattel to a customer at a certain rent, with a proviso that if the rent be punctually paid for a certain period, *then, and not till then*, the chattel shall become the property of the customer. Although substantially these agreements are intended to enable a man to sell goods on credit, while retaining a security on the chattel for the price, they are

(e) *Wilkinson v. Girard Freres*, 7 T. L. R. 266.

(f) *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352.

(g) *Newlove v. Shrewsbury*, 21 Q. B. D. 41.

(h) *Exp. Cooper, re Baum*, 10 Ch. D. 313, explained in *North Central Wagon Co. v. Manchester, Sheffield, and Lincolnshire Rail. Co.*, 35 Ch. D. 191, affirmed, 13 App. Cas. 554 (sub. nom. *Manchester, Sheffield, and Lincolnshire Rail. Co. v. North Central Wagon Co.*); *Woodgate v. Godfrey*, 5 Ex. D. 24; *Marsden v. Meadows*, 7 Q. B. D. 80.

(i) See *Exp. Parsons, re Townsend*, 16 Q. B. D. 532.

(k) *Brown v. Bateman*, L. R. 2 C. P. 272; *Exp. Newitt, re Garrud*, 16 Ch. D. 522; *Reeves v. Barlow*, 12 Q. B. D. 436.

(l) *Re Weibking, Exp. Ward*, [1902] 1 K. B. 713.

nevertheless not bills of sale within the meaning of the Acts, as the goods remain the property of the manufacturer or tradesman, and the power to retake them on default is not a power to seize as security for a *debt* (*m*). The essence of the validity of these transactions is that the property in the chattels does not pass to the purchaser until the money is paid. There is, therefore, no security created *on the debtor's goods* (*n*). Where, on the contrary, there is a sale of goods passing the immediate property to the purchaser, and then a provision for payment of the purchase-money by instalments and interest is charged on the goods, the document is a bill of sale, and unless (as would seem to be impossible) it complies with the conditions of the Act it will be void *in toto* (*o*).

Paragraphs
80—81

81. But, nevertheless, a hire-purchase agreement will not be allowed to oust the Acts where it is used, conjointly with a sham sale by the borrower to the lender, merely as a cloak to disguise what is in truth and substance and according to the intent of the parties a security for a loan (*a*). Thus, where a borrower purports to make an absolute sale of chattels to the lender, and, by a contemporaneous agreement, the lender hires them to him at a rent, with a proviso that the goods shall re-vest in the borrower when a certain number of instalments of the rent (representing the sum borrowed and interest) are paid; then, as such a transaction is in reality only a juggle in order to enable the borrower to give a security *on his own chattels* without complying with the provisions of the Acts, it will be void (*b*). The decided cases on this point may seem at first sight somewhat conflicting, and Mr. Justice *Cave* in one case (*c*) (the decision of which is respectfully questioned) seems to have regarded them as irreconcilable and wanting in any intelligible principle. It is, however, humbly submitted that no question of law or principle is involved. Each case depends upon its facts, and the decision must turn upon whether the transaction was a *bonâ fide* out-and-out sale, with a contemporaneous agreement for hire and re-purchase, or whether the contemporaneous sale was merely a form,

Sham hire-purchase agreements may be bills of sale.

(*m*) *Climpson v. Coles*, 29 Q. B. D. 465.

(*n*) *Exp. Crawcour, re Robertson*, 9 Ch. D. 419; *Exp. Emerson*, 41 L. J. Bk. 20; *Exp. Collins, re Yarrow*, 59 L. J. Q. B. 18; 61 L. T. 642; 38 W. R. 175; *Manchester, Sheffield, and Lincolnshire Rail. Co. v. North Central Wagon Co.*, 13 App. Cas. 554; *McEntire v. Crossley Bros.*, [1895] A. C. 457.

(*o*) *Coburn v. Collins*, 35 Ch. D. 373, a very hard and indeed extreme case.

(*a*) *Exp. Odell, re Walden*, 10 Ch. D. 76; *French v. Bombernard*, 60 L. T. 49; *Jones v. Tower Furnishing Co.*, 61 L. T. 84; *re Watson, Exp. Official Receiver in Bankruptcy*, 25 Q. B. D. 27; *Madell v. Thomas & Co.*, [1891] 1 Q. B. 230; *Brown v. Blaine*, 1 T. L. R. 158; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1, and 638; *Maas v. Pepper*, [1905] A. C. 102.

(*b*) See judgment of CAVE, J., in *Exp. Collins, re Yarrow, supra*.

(*c*) *Exp. Collins, re Yarrow, supra*.

Paragraphs
81—82

and according to the true intent of the parties, meaningless (*d*). In fact, the point is of a similar character to that mentioned above (20) in relation to sales of real estate with an option to re-purchase, in which the question frequently arises whether they are what they seem or whether they are not in substance mortgages, and intended to be such. Analogous considerations also frequently arise in relation to the effect of loans secured on the profits of a business, where the question is whether the transaction constituted a partnership between the lender and the borrower, or merely created the relation of debtor and creditor (*e*).

Attornment
clauses for
securing
loans are
bills of sale.

82. In addition to the instruments discussed above, every attornment instrument or agreement, not being a mining lease (*f*), whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, or whereby any rent is reserved or made payable as a mode of providing for payment of interest on such debt or advance or otherwise for the purpose of such security only, is *to be deemed to be a bill of sale within the meaning of the Acts, of any personal chattels which may be seized or taken under such power* (*g*). But this is not to extend to any mortgage of any estate or interest in any hereditaments which the mortgagee, being in possession, shall demise to the mortgagor as his tenant, at a fair and reasonable rent (*h*).

The object of this provision was to prevent the practice which had been adopted, in order to avoid registration under the Act of 1854, of making securities upon chattels by assignment or demise of the interest of the debtor in the premises in which the chattels were placed, with a proviso that the premises should be held by the debtor as tenant from year to year at a rent, which, with the tenancy itself, should cease upon payment of all moneys recoverable under the security; a power of entry without previous demand being also reserved upon default in payment.

It must be noted, that, under this section, attornment clauses are not *ipso facto* bills of sale, but only in respect of any personal chattels

(*d*) See *per* FRY, L.J., *United Forty Pound Loan Club v. Bexton*, [1891] 1 Q. B. 28 n., and *per* C. A., *Madell v. Thomas & Co.*, [1891] 1 Q. B. 230, and *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1, and 638.

(*e*) See *per* Lord HALSBURY, *Adam v. Newbigging*, 13 App. Cas., at p. 315.

(*f*) See *re Roundwood Colliery Co.*, *Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373, extending the exemption to powers of distress on other lands not comprised in the lease.

(*g*) *I.e.*, has actually taken possession and subsequently *bonâ fide* demised to the mortgagor. *Exp. Kennedy, re Willis*, 21 Q. B. D. 384; *Green v. Marsh*, [1892] 2 Q. B. 330.

(*h*) Act of 1878, s. 6. It must not be excessive, having regard to the nature of the property. In short the rent must be a real rent for a real tenancy and not a mere blind for further securing principal or interest, see *re Stockton Iron Furnace Co.*, 10 Ch. D. 335; 40 L. T. 19; *Ex parte Jackson, re Bowes*, 14 Ch. D. 725.

which may be seized or taken under the right of distress given by law to a landlord (*i*), or under an express power in that behalf (*i*), so that although they may not comply with the conditions and restrictions imposed on bills of sale by the Acts they may be perfectly good except as to chattels seized: *ex. gr.*, for the purpose of creating the relation of landlord and tenant so as to enable the mortgagee to recover possession summarily under Order III., r. 6, and Order XIV., r. 1, of the R. S. C. (*k*).

Paragraph
82—83

It has also been held that attornment clauses are only subject to the requirements of the Acts with regard to registration, and are not subject to the conditions as to form, etc., hereinafter referred to (*l*).

It has, however, been decided that a power of distress in a genuine lease, enabling the landlords (brewers) to distrain for beer supplied to the tenant (a publican), was a bill of sale within this section in respect of goods seized under the power (*m*).

As the provisions of the Act of 1878 with regard to attornments are not retrospective, any such clauses in mortgages executed before 1879 possess the same validity as they originally had, as to which, see *infra* (882).

83. The following documents are excepted, either expressly or impliedly, from the operation of the Acts, viz. :—

Exceptions to
the statutory
definition of
“bill of sale.”

- (a) Assignments for the benefit of creditors generally, or of such of them as may choose to avail themselves of it (*n*). But not assignments excluding any class of creditors or any creditor's nominatim, or made in favour of some creditors only (*o*).
- (b) Marriage settlements (*p*), including agreements for settlements (*q*), but excluding post-nuptial ones (*r*).
- (c) Transfers or assignments of, or charges on any ship or vessel whether British or foreign (*s*), or any share thereof (*p*)

(*i*) *Exp. Kennedy, re Willis*, 21 Q. B. D. 384.

(*k*) *Hull v. Comfort*, 18 Q. B. D. 11; *Mumford v. Collier*, 25 Q. B. D. 279; and see also *Stevens v. Marston*, 39 W. R. 129.

(*l*) *Green v. Marsh*, [1892] 2 Q. B. 330.

(*m*) *Pulbrook v. Ashby*, 35 W. R. 779.

(*n*) Act of 1878, s. 4. *Hadley & Son v. Beedom*, [1895] 1 Q. B. 646.

(*o*) *Ib.* and *Reg. v. Creese*, L. R. 2 C. C. R. 105. *Exp. Parsons, re Townsend*, 34 W. R. 329; S. C. 16 Q. B. D. 532. Assignments are within the statutory exception, though not appearing on the face of them to have been executed by all the creditors if they do not exclude any. *General Furnishing Co. v. Venn*, 2 H. & C. 153.

(*p*) Act of 1878, s. 4.

(*q*) See *Wenman v. Lyon*, [1891] 2 Q. B. 192.

(*r*) *Fowler v. Foster*, 28 L. J. Q. B. 210; *Ashton v. Blackshaw*, L. R. 9 Eq. 510.

(*s*) *Union Bank of London v. Lenanton*, 3 C. P. D. 243.

Paragraph
83

including barges, flats, and any kind of vessel beyond a mere boat(*t*) and including vessels in course of construction(*u*).

- (d) Bills of sale of goods at sea, or outside England(*x*).
- (e) Bills of lading, India warrants, warehouse keepers' certificates, warrants or orders for the delivery of goods or any other documents used in the ordinary course of business as proof of the possession or control of goods(*y*), or authorizing, either by indorsement or delivery, the possessor of such document to transfer or receive the goods thereby represented(*z*).
- (f) The mortgages or charges of any incorporated company for the registration of which a statutory provision is made by the Companies Clauses Act, 1845, or the Companies Act, 1862 (or now the Companies Consolidation Act, 1908(*a*)); and the *debentures* of every incorporated company, whether coming within those statutes or not(*b*). But this does not include debentures issued by corporations which are not companies, *ex. gr.* municipal or chartered corporations or societies registered under the Industrial and Provident Societies Acts(*c*).
- (g) Instruments charging, or creating any security on, or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory or store, or to their being re-shipped for export or delivered to a purchaser not being the person giving or executing such instrument(*d*).

The 4th section also excludes transfers of goods in the ordinary course of business of any trade or calling; but as this has been held

(*t*) *Gapp v. Bond*, 19 Q. B. D. 200; 56 L. J. Q. B. 438.

(*u*) *Exp. Winter, re Softley*, L. R. 20 Eq. 746; 33 L. T. (N.S.) 62.

(*x*) Act of 1878, s. 4, and see *Coote v. Jecks*, L. R. 13 Eq. 597; *Brookes v. Harrison*, 6 L. R. Ir. 332.

(*y*) *Re Hamilton Young & Co., Exp. Carter*, [1905] 2 K. B. 772.

(*z*) Act of 1878, s. 4.

(*a*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; *per* BOWEN, L.J., p. 645; approving *Welsted & Co. v. Swansea Bank*, 5 T. L. R. 332; *Read v. Joannon*, 25 Q. B. D. 300, 302; *Edmonds v. Blaina Furnaces Co.*, 36 Ch. D. 215; and *Levy v. Abercorris Slate and Slab Co.*, 37 Ch. D. 260. The exception comprises covering deeds to trustees for securing debentures: *Richards v. Overseers of Kidderminster*, [1896] 2 Ch. 212.

(*b*) *Ib.* and s. 17 of the Act of 1882. And see *Clark v. Balm Hill & Co.*, [1908] 1 K. B. 667. As to the meaning of the word "debentures," which is not necessarily restricted to a series of securities, but also applies to a single document, see *Ross v. Army and Navy Hotel Co.*, 34 Ch. D. 43; *Edmonds v. Blaina Furnaces Co.*, *supra*; *Levy v. Abercorris Slate and Slab Co.*, *supra*; *Re Bansha Woollen Mills Co.*, 21 L. R. Ir. 181; *Davies v. Rees*, 17 Q. B. D. 408; but *cf.* *Topham v. Greenside Glazed Fire-brick Co.*, 37 Ch. D. 281.

(*c*) *Great Northern Rail. Co. v. Coal Co-operative Society*, [1896] 1 Ch. 187, *sed quære*; *Clark v. Balm Hill & Co.*, *supra*.

(*d*) Bill of Sale Act, 1891, s. 1.

to be inapplicable to the borrowing of money on mortgage or special agreement (though such a thing may be frequent in such trade or business) (e), it does not seem proper to include such transfers in the above list of exempted securities.

Paragraphs
83—85

SUB-SECTION (2).—*As to the meaning of “personal chattels” as used in the Bills of Sale Acts.*

84. Having seen what kinds of instruments are and what are not bills of sale for the purposes of the Acts, it is now necessary to consider what kinds of property fall within the provisions of the Acts; for even where an instrument is a bill of sale, it is not necessarily void *in toto*, but, if it is possible to sever the security, may be valid as to property other than personal chattels comprised therein (f). Even where an instrument is a bill of sale it must relate to “personal chattels” in order to fall within the Act.

85. The Act of 1878 (g) defines the expression “personal chattels” to mean goods, furniture or other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, and also “trade machinery” (h), which latter expression is defined to mean the machinery used in or attached to any factory or workshop:— Statutory definition of personal chattels.

1. Exclusive of the fixed motive powers, such as the water wheels and steam engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive powers; and Trade machinery.
2. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose; and
3. Exclusive of the pipes for steam, gas and water in the factory or workshop. Such excluded machinery or effects are not personal chattels within the meaning of the Act.

“Factory or workshop” means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say,

- (a) The making any article or part of an article; or
- (b) The altering, repairing, ornamenting, finishing; or
- (c) Adapting for sale any article.

(e) *Tennant v. Howatson*, 13 App. Cas. 489, 494.

(f) *Exp. Byrne, re Burdett*, 20 Q. B. D. 310; *Exp. Mason, re Isaacson*, [1895] 1 Q. B. 333; *Re O'Dwyer*, 19 L. R. Ir. 19; *Re Bansha Woollen Mills Co.*, 21 L. R. Ir. 181; cf. *Heseltine v. Simmons*, [1892] 2 Q. B. 547.

(g) Sect. 4.

(h) *Ib.* s. 5.

Paragraphs
86—87

86. The Act, however, expressly excepts from the definition of personal chattels :—

Exceptions
from
definition of
personal
chattels.

- (a) Chattel interest in real estate.
- (b) Growing crops when assigned together with any interest in the land on which they grow (*i*), and of securities on fixtures (other than trade machinery) when assigned together with a *freehold* or *leasehold* interest in any land or building to which they are affixed (*j*).
- (c) Shares or other interests in the stock funds or securities of any government, or in the capital or property of incorporated or joint stock company (*k*).
- (d) Choses in action (*k*).
- (e) Stock or produce on any farm or lands which, by virtue of covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are at the time of suing or making the security (*k*).
- (f) Ships and vessels. (Impliedly only, because they are somewhat inartistically excluded from the Acts under the exceptions to the definition of “ Bill of Sale.”)

Questionable
whether
fixtures when
assigned
together with
copyhold
interest in
land, are
excluded.

87. It will be observed that fixtures are excluded from the definition of personal chattels by the Act of 1878, when they are assigned together with a freehold or leasehold interest in the land or building. It is, therefore, considered (though there seems to be no reason for the distinction) that a separate assignment of fixtures attached to *copyholds* by words which would have amounted to a separate assignment under the Act of 1854 (*l*), will make the security liable to registration ; for the courts in construing these and other statutes refuse to insert words not found in the Act, on the speculation that they were omitted by inadvertence (*m*). The difference in the language as to growing crops, the assignment of which, together with

(*i*) Act of 1878, s. 4.

(*j*) *Ib.* As to what constitutes a separate assignment of fixtures or crops, so as to make such assignment a bill of sale within the Act, see *infra* (88).

(*k*) *Ib.*

(*l*) Under which the rule was, that it was unnecessary to register a conveyance of or contract concerning land, by the mere force of which a legal or equitable interest passed in fixtures or other chattels as adjuncts to the land, and which the mortgagee is not empowered to sever from it : *Mather v. Fraser*, 2 K. & J. 536 ; *Brown v. Bateman*, L. R. 2 C. P. 272 ; *Exp. Barclay, re Joyce*, L. R. 9 Ch. 576. But fixtures for the purposes of trade only, not permanent adjuncts to the land, and the property in which is distinct from their connection with the freehold, or which the mortgagee by his security has power to sever and sell separately, were within the Act when assigned by separate words, and were not exempt because the land was charged by the same instrument : *Waterfall v. Penistone*, 6 El. & Bl. 876 ; *Begbie v. Fenwick*, L. R. 8 Ch. 1075, n. ; *Exp. Daglish, re Wilde*, L. R. 8 Ch. 1072 ; *Hawtry v. Butlin*, L. R. 8 Q. B. 290. And see *Hellawell v. Eastwood*, 6 Ex. 295 ; *John v. Ware*, [1899] 1 Ch. 359.

(*m*) See *Edwards v. Edwards*, 2 Ch. D., at p. 297, *per* MELLISH, L.J. ; *Carrard v. Meek*, 50 L. J. Q. B. 187 ; *Hill v. Kirkwood*, 28 W. R. 358.

any interest in the land, takes them out of the category of personal chattels, is remarkable, but probably has no particular meaning. Anyhow it would be safer, until the point is decided, to frame mortgages of copyholds so as to let the fixtures pass by operation of law and not expressly; and particularly to avoid giving the mortgagee a right to sever and sell them apart from the land (n).

Paragraphs
87—89

88. It will be perceived that fixtures and crops *separately assigned* are considered to be personal chattels for the purpose of the Acts. The 7th section, however, provides that no such crops or fixtures are to be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of, or dealing with such land or building or land (o).

What constitutes a separate assignment of crops or fixtures so as to make such assignment a bill of sale.

89. But although crops and ordinary fixtures are excluded from the operation of the Acts unless they are assigned apart from the freehold or leasehold (or possibly copyhold) lands to which they are affixed, the section does not apply the same rule to trade machinery as above defined. It is scarcely possible to doubt that the object of the power of the Acts was to prevent trade machinery being made a security for money except by means of a bill of sale complying with all the requirements of the Acts. The courts have, however, decided that this intention has not been effected with regard to *fixed* trade machinery, which, like other fixtures, still passes without any express words to a mortgagee of the land. Consequently where the mortgage of a factory made no reference to fixtures, and gave no power to the mortgagee to seize or sever and sell the trade machinery as chattels, apart from the land, it was held that a valid security extending over the trade machinery was given (p) and the same conclusion was arrived at by *Kekewich, J.*, where the trade machinery was expressly mentioned (q). In another case, however (r), *Stirling, J.*, took a different view, apparently on the ground that the words there not merely expressly assigned the fixed but also the movable machinery, and that, *on the true construction of the deed*, the mortgagees might have severed the fixed machinery and sold it separately. The net result of the Acts, *qua* trade machinery, appears to be that where a mortgagee of land stipulates for the right of seizing and selling it apart from the land on which it stands, the transaction must be carried out by a registered bill of sale in the statutory

Trade machinery not made severable may pass to mortgagee if fixed.

Principle of decisions as to trade machinery.

(n) See *infra* (89).

(o) Act of 1878, s. 7.

(p) *Batcheldor v. Yates*, 38 Ch. D. 112.

(q) *Re Brooke, Brooke v. Brooke*, [1894] 2 Ch. 600.

(r) *Small v. National Provincial Bank of England*, [1894] 1 Ch. 686.

Paragraphs
89—90

form(s); but that with regard to ordinary fixtures he may make that stipulation without coming within the Acts. Of course, however, in all cases where it is desired to mortgage fixtures (whether trade machinery or not) without mortgaging the land to which they are affixed, a bill of sale is necessary.

SUB-SECTION (3).—*Conditions and restrictions, compliance with which is essential to the validity of a bill of sale given as security for money, as against the grantor and his creditors.*

Conditions
essential
to the
validity of
bill, even as
against
grantor.

90. Having now shortly stated what bills of sale given by way of security for money do, and what do not, fall within the Bills of Sale Acts, it remains to consider the restrictions and conditions imposed by the Acts upon those bills of sale given by way of security for money to which the Acts apply.

The Acts, then, make every such bill of sale void (where conditions (a) and (b) (*infra*) are broken, *in toto*, and in other cases as to the personal chattels comprised therein (*t*)), not merely as against the grantor's creditors, but *even as against the grantor himself*.

- (a) Unless the bill be made in substantial (*u*) accordance with the form contained in the schedule to the Act of 1882 (*x*).
- (b) Unless it be given by way of security for a sum of not less than 30*l.* (*y*).
- (c) Unless the consideration for which it is given is truly set forth (*z*).
- (d) Unless the execution of it by the grantor is attested by one or more credible witnesses, not being a party or parties thereto (*a*).
- (e) Unless within seven days after the making or giving of the bill (*b*) (or if executed out of England, within seven clear days after the time at which it would, in the ordinary

(*s*) *Exp. Lusty*, 60 L. T. 160; *Re Vulcan Ironworks Co.*, W. N. (1888), 37. As to a vendor's lien on trade machinery, see *Re Vulcan Ironworks Co.*, *supra*. As matter of construing the intention of parties to a mortgage, words including fixtures "which would not require registration under the Bills of Sale Acts" may have the effect of excluding trade machinery, which in the absence of such words would have passed. See *re London and Lancashire Paper Mills Co., Ltd.*, 57 L. J. Ch. 766.

(*t*) See *infra*, paragraphs 120—123.

(*u*) *Davis v. Burton*, 11 Q. B. D. 537.

(*x*) Act of 1882, s. 9, *Thomas v. Kelly*, 13 App. Cas. 506.

(*y*) *Ib.*, s. 12.

(*z*) *Ib.*, s. 8.

(*a*) *Ib.* ss. 8 and 10. There appears to be no objection to execution of a bill of sale by an attorney, under a power of attorney, even although he be the grantee. *Furnivall v. Hudson*, [1893] 1 Ch. 335 (NORTH, J.).

(*b*) *Ib.* s. 8, and Act of 1878, s. 8.

course of post, have arrived in England if posted immediately after its execution (*c*)), or within such extended time as any judge of the High Court may (on being satisfied that the omission to comply with this provision was due to accident or inadvertence) direct (*d*), the following documents are produced to, and those numbered (2) and (3) filed with the Registrar of Bills of Sale, viz. :—(1) The bill itself, with every schedule and inventory annexed (*e*) ; (2) A true copy of such bill, schedules and inventory, and of every execution and attestation of the execution thereof (*e*) ; and (3) An affidavit of the time of such bill being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness (*e*) ; and (4) If the bill is given or made subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance, etc., is to be deemed part of the bill, and must be written on the same paper or parchment before registration, and must be truly set forth in the filed copy, otherwise the registration will be void (*f*).

Paragraphs
90—92

(f) Unless such registration be renewed every five years (*g*).

91. With regard to compliance with the scheduled form, that form “seems to have been intended to attain, first, certainty and simplicity ; secondly, the statement of the consideration—a sum in money numbered, and (reading the language of the form) ‘now paid to’ the grantor, the receipt of which the grantor thereby acknowledges ; thirdly, that the assignment is confined to the chattels and things specifically described in the schedule thereto annexed ; fourthly, that it shall be by way of security for the same sum then advanced, with interest at a specified rate, to be repaid to the grantee with the interest then due, by equal payments, on fixed days ; fifthly, the insertion of the terms which the parties have agreed to for the maintenance of the security and its defeasance ; sixthly, the incorporation, by reference, of the provisions of s. 7 which restrict the right of the grantee to take possession ” (*h*).

Object of
statutory
form.

92. Nothing *substantial* may be either added to or subtracted from it (*i*) ; but any deviation is allowable if it produces the precise

What is
sufficient
compliance

(*c*) Act of 1882, s. 8, and Act of 1878, s. 8.

(*d*) Act of 1878, s. 14, and see *Crew v. Cummings*, 21 Q. B. D. 420.

(*e*) Act of 1878, s. 10.

(*f*) As to the effect of this, see *Heseltine v. Simmons*, [1892] 2 Q. B. 547.

(*g*) Act of 1878, s. 11. Omission to register avoids it even as against the grantor: *Fenton v. Blythe*, 25 Q. B. D. 417.

(*h*) Per Lord FITZGERALD in *Thomas v. Kelly*, 13 App. Cas., at p. 516.

(*i*) *Davis v. Burton*, 11 Q. B. D. 537 ; *Thomas v. Kelly*, *supra*.

Paragraphs 92—95 legal effect (neither more nor less) of the form (*k*), and does not destroy that simplicity which it was one of the objects of the Act to attain. Prolix recitals may avoid it (*l*), and puzzling and inartistic provisions, even although the result of them, when construed by an expert, is the same as the statutory form ; for the form was meant for the benefit of plain people, and not experts (*m*). A similar result was held to follow where a bill was given to secure four different sums, to four different creditors, payable at different times, as the statutory simplicity was not complied with (*n*). On the same ground two or more grantors who are not *jointly* interested in the goods cannot give a valid bill of sale of them (*o*). The omission of anything required by the form (except the address and description of the attesting witness), cannot be supplied by means of the affidavit which has to be filed when the bill is registered (*p*).

with
statutory
form.

Complexity
fatal.

Omissions
cannot be
supplied by
statutory
affidavit.

If form
cannot be
complied
with, the
bill is void.

Statutory
form does
not apply to
attornment
clauses.

Decisions as
to compliance
with
statutory
form.

93. If substantial compliance with the form is impossible, owing to the nature of the transaction, then a bill of sale by way of security for money cannot be made at all (*q*) ; *ex. gr.*, a bill of sale cannot now be given to a surety by the principal debtor, by way of indemnity (*r*).

94. The provisions as to the use of the statutory form have been held not to extend to attornments, etc., because s. 6 of the Act of 1878 does not make such instruments *bills of sale*, but merely directs that they shall be deemed to be bills of sale of *any chattels that may be distrained under them*. It was therefore not intended to avoid them *ab initio*, as in the case of other bills of sale which do not comply with the statutes, but only to impose upon them the necessity of registration (*s*).

95. The following points have been decided in relation to compliance with the statutory form, viz. :—

The addresses of both parties even where the grantee is a limited company must be given (*t*) ; but the usual description of the grantor is sufficient even although he has no business of the kind indicated (*u*).

(*k*) *Roberts v. Roberts*, 13 Q. B. D. 794 ; *Exp. Stanford, re Barber*, 17 Q. B. D. 259 ; *Exp. Allam, re Munday*, 14 Q. B. D. 43 ; *Kelly v. Kellond*, 20 Q. B. D. 569. *Conf. De Braam v. Ford*, [1900] 1 Ch. 142 ; *Mourinand v. Le Clair*, [1903] 2 K. B. 216.

(*l*) *Exp. Stanford, re Barber, supra, per FRY, L.J.*

(*m*) *Furber v. Cobb*, 18 Q. B. D. 494 ; at the same time, the mere fact that two courts differ as to the proper construction of a bill is not of itself ground for avoiding it under this principle : *Haslewood v. Consolidated Credit Co.*, 25 Q. B. D. 555 ; *Weardale Coal and Iron Co. v. Hodson*, [1894] 1 Q. B. 598 ; *Edwards v. Marston*, [1891] 1 Q. B. 225.

(*n*) *Melville v. Stringer*, 13 Q. B. D. 392.

(*o*) *Saunders v. White*, [1902] 1 K. B. 472.

(*p*) *Bird v. Davey*, [1891] 1 Q. B. 29.

(*q*) *Exp. Parsons, re Townsend*, 16 Q. B. D. 532.

(*r*) *Hughes v. Little*, 18 Q. B. D. 32.

(*s*) *Green v. Marsh*, [1892] 2 Q. B. 330, 335, *per KAY, L.J.*

(*t*) *Altree v. Altree*, [1898] 2 Q. B. 267.

(*u*) *Re Davies, Exp. Equitable Investment Co., Ltd.*, 77 L. T. 567.

An agreement to pay the debt, on "demand," and within a certain period after demand (*x*), or "forthwith" (*y*), is not according to the form, which requires a "stipulated time" (*z*).

An assignment by the grantor "as beneficial owner" is void; because it gives to the bill a legal effect different to that which appears on the face of it (*a*).

An agreement to pay principal and a lump sum for agreed interest, by instalments, is not according to the form, which requires the *rate* of interest to be stated, and also because on failure of one instalment, the grantee might seize and sell for payment of the whole amount, although some of the agreed interest might not have been earned (*b*).

A provision for payment of interest upon arrears of interest is contrary to the form (*c*), and so is a provision for payment of a bonus (*d*).

On the other hand, although the form provides for the repayment by instalments, it is not essential that it should be followed in that respect, a single repayment being allowed (*e*); and for the same reason instalments need not be equal (*f*), nor need principal and interest be paid *pari passu*; the principal may be made payable first, and the interest afterwards, or *vice versa* (*g*). But the amount of interest and the period when it is payable must not both be uncertain (*h*) and no interest will be allowed after realization (*i*). As the effect of the form is to give the creditor the right to realize if a single instalment is unpaid, there is no objection to an express stipulation to that effect being inserted in the bill (*k*). And on the other hand, a stipulation for payment on a day certain, with a proviso that if the debtor should punctually pay by instalments the creditor will accept such payments, has been held unobjectionable (*l*). Where the money is payable

(*x*) *Hetherington v. Groome*, 13 Q. B. D. 789; *Sibley v. Higgs*, 15 Q. B. D. 619; *Bishop v. Beale*, 1 T. L. R. 140.

(*y*) *Exp. Pearce, re Williams*, 25 Ch. D. 656.

(*z*) See *De Braam v. Ford*, *supra*.

(*a*) *Exp. Stanford, re Barber*, 17 Q. B. D. 259.

(*b*) *Davis v. Burton*, 11 Q. B. D. 537; *Myers v. Elliott*, 16 Q. B. D. 526; *Blankenstein v. Robertson*, 24 Q. B. D. 543; disapproving *Thorpe v. Cregeen*, 55 L. J. Q. B. 80, and *Wilson v. Kirkwood*, 48 L. T. 821, but distinguishing *Linfoot v. Pockett*, [1895] 2 Ch. 835, and see and distinguish *Lumley v. Simmons*, 34 Ch. D. 698.

(*c*) *Dresser v. Townsend*, 81 L. T. Journal, 230.

(*d*) *Exp. Pearce, re Williams*, 25 Ch. D. 656.

(*e*) *Watkins v. Evans*, 18 Q. B. D. 386.

(*f*) *Goldstrom v. Tallerman*, 18 Q. B. D. 1; *Re Cleaver, Exp. Rawlings*, 18 Q. B. D. 489.

(*g*) *Edwards v. Marston*, [1891] 1 Q. B. 225.

(*h*) *Attia v. Finch*, 91 L. T. 70.

(*i*) *West v. Diprose*, [1900] 1 Ch. 337.

(*k*) *Re Wood, Exp. Woolfe*, [1894] 1 Q. B. 605.

(*l*) *Re Coton, Exp. Payne*, 56 L. T. 571; 35 W. R. 476; 4 Morrell, 90.

Paragraphs
95—96

by instalments, the fact that a calculation may be necessary to get at the number of instalments, does not avoid the bill, as the same objection might be applied to the form itself (*m*).

An express stipulation may be inserted that the goods may be seized on the happening of any of the events specified in s. 7 of the Act of 1882 (909); for that is no more than the legal effect of the form itself (*n*); but the events must not be amplified; *ex. gr.*, it will not do to include liquidation or composition by the debtor, s. 7 only relating to bankruptcy (*o*).

What
stipulations
for mainten-
ance or
defeasance
of security
are allowed
to be added
to statutory
form.

Covenants
allowed.

96. A note appended to the statutory form, expressly authorizes the insertion of "terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security." This note has given rise to much discussion, and it seems to be impossible to lay down any intelligible principle as to what terms may, and what terms may not, be agreed to under it. A contract for further assurance has been held to be within it (*p*), but it seems doubtful whether the ordinary mortgagor's covenants for title would be (*q*). Covenants to repair and replace (*r*), and not to remove the goods without consent (*s*), and to produce receipts for rent, rates and taxes (*t*), provisions for insurance and application of the insurance money in discharging the debt (*u*), and even power for the creditor, in case of default in insuring or repairing, to enter and insure and repair himself, and to charge all moneys so expended, with interest, on the goods, was held to be good in the absence of powers to seize for breach of such covenants or power (*x*). The following stipulations have also been supported, viz. :—A proviso making void the security on payment of principal, interest, and *any expenses* which the grantee might lawfully incur in lawfully seizing and removing the chattels, and any costs he might properly incur in defending and maintaining his rights under the bill; and power in case the grantee became entitled to seize the chattels, to break

(*m*) *Exp. Hasluck, re Bagen*, [1894] 1 Q. B. 444; *Linfot v. Pockett*, [1895] 2 Ch. 835.

(*n*) *Exp. Allam, re Munday*, 14 Q. B. D. 43; *Exp. Pope, re Paxton*, 60 L. T. 428.

(*o*) *Gilroy v. Bowey*, 59 L. T. 223; *Exp. Pearce, re Williams*, 25 Ch. D. 656.

(*p*) *Re Cleaver, Exp. Rawlings*, 18 Q. B. D. 489.

(*q*) See *Liverpool Commercial Investment Society v. Richardson*, 55 L. J. Q. B. 455 n., and *Sedgwick v. Hellier*, 31 Sol. J. 661.

(*r*) *Furber v. Cobb*, 18 Q. B. D. 494; *Consolidated Credit and Mortgage Corporation v. Gosney*, 16 Q. B. D. 24; *Seed v. Bradley*, [1894] 1 Q. B. 319.

(*s*) *Re Coton, Exp. Payne*, 56 L. T. 571; 35 W. R. 476; 4 Morrell, 90.

(*t*) *Turner v. Culpan*, 58 L. T. 340; *Furber v. Cobb*, 18 Q. B. D. 494; *Cartwright v. Regan*, [1895] 1 Q. B. 900. But as to excuse for not complying with such a covenant, see *Exp. Wickens*, [1898] 1 Q. B. 543.

(*u*) *Neverson v. Seymour*, 97 L. T. 788.

(*x*) *Topley v. Corsbie*, 20 Q. B. D. 350. But there must be no terms, even impliedly, importing a power to seize in contravention of the provisions of s. 7 of the Act of 1882. See and consider *Real and Personal Advance Co. v. Clears*, 20 Q. B. D. 304; *Bianchi v. Offord*, 17 Q. B. D. 484.

open doors and windows in order to obtain admission, and a power after five clear days from the day of seizure to remove and sell the chattels, and retain out of the proceeds the principal unpaid, and interest due, and all costs and expenses (y). Paragraphs
96—98

97. On the other hand, it has been held to be inadmissible to insert a covenant that the grantor will pay the interest on mortgages (if any) of the premises on which the goods might be for the time being; on the ground that such a covenant would oblige the mortgagor to pay the interest on such mortgages, even although they might contain no powers of distress, and although such mortgages might not have been made by himself, but by others, and that, therefore, a covenant in such wide terms was not necessary for the maintenance of the security (z). By the same case it was decided, that a proviso that, after redemption, the bill of sale should continue in the possession of the creditor, avoided the bill, as such stipulation was intended to put obstacles in the way of the debtor commencing legal proceedings in respect of what may have occurred while the bill was in force, and that, therefore, while altering the rights of the parties from what they would have been under the statutory form, it was quite unnecessary for the maintenance of the security. Similarly, stipulations that the debtor shall not obtain credit to the extent of 10*l.* without the consent of the grantee, and that the former would give the bulk of his business to the grantee, and allow him to inspect his books, were held to avoid the bill (a). Covenants
disallowed.

98. A mortgagee of personal chattels, of which he has taken possession, has, without any express power in the mortgage, upon default in payment of the mortgage-money, and after reasonable notice (*semble* after five days), power to sell the chattels, and the power of sale conferred by the Conveyancing Act is, consequently, not incorporated in bills of sale; and a proviso excluding the operation of s. 20 of that Act is merely superfluous, and does not invalidate the bill (b). But, on the other hand, a clause providing that out of the moneys to arise out of any sale, the creditor should in the first place pay the expenses attending such sale, "or otherwise incurred in relation to this security," has been held to invalidate the bill, on the ground that it "gives the utmost possible latitude to the mortgagee to retain an indefinite amount for expenses, provided they related in any way to the security." Such rights would, in the opinion of the Court of Appeal, be much larger than he would Powers of
sale.

(y) *Lumley v. Simmons*, 34 Ch. D. 698, and see *re Cleaver, Exp. Rawlings*, 18 Q. B. D. 489.

(z) *Watson v. Strickland*, 19 Q. B. D. 391; and see also *Lee v. Barnes*, 17 Q. B. D. 77, where there was a covenant to perform the covenant contained in another deed.

(a) *Peace v. Brookes*, [1895] 2 Q. B. 451.

(b) *Exp. Official Receiver, re Morritt*, 18 Q. B. D. 222; full Court of Appeal, FRY, J., *diss.*; *Calvert v. Thomas*, 19 Q. B. D. 204.

Paragraphs
98—100

have been entitled to if the form had been substantially followed (c). As Lord Justice *Lindley* pointed out, under it, oppressive charges in respect of the expenses of the frequent inspection of the goods, might be made, and also charges in respect of the preparation of the security. The mortgagee is, however, entitled to retain his *proper* expenses (d). Where the debt is payable by instalments and the goods are sold before all the instalments are due by arrangement between both parties, the grantee is not entitled to interest after the date of realization (e). As to express powers of sale that have been held valid, see *Re Cleaver, Exp. Rawlings* (f), and *Bourne v. Wall* (g), the latter referring to a power to sell the goods by public auction, or private contract, on or off the premises. But the practitioner must be careful not to insert the usual ancillary powers, providing that the mortgagee's receipt shall discharge the purchaser (h), and relieving the latter from seeing whether the power has properly arisen (i), as they are inadmissible.

Usual
ancillary
powers
disallowed.

Omissions
from
statutory
form.

99. With regard to omissions from the statutory form, a bill is invalid which omits the final proviso limiting the creditor's right to seize (k), or which omits the name or address or description of the attesting witness (l) or the acknowledgment of the receipt of the loan (m); but the address need not be his residential address, the address where he is generally to be found being sufficient (n). And, where the same witness attests two signatures, his address and description need not be added to each attestation if, from a comparison of handwriting or otherwise, it is apparent that the same person attested both signatures (o).

Collateral
documents
adding to
provisions of
bill are not
allowable.

100. It is not permissible to avoid the statutory conditions by having a collateral deed containing covenants and provisions which would make the bill void if they formed part of it. In such cases, the two documents must be regarded as one, and the bill at all events will be void (p). The collateral document may, however, be good (q).

(c) *Calvert v. Thomas*, *supra*; *Macey v. Gilbert*, 57 L. J. Q. B. 461.

(d) *Exp. Official Receiver, re Morritt*, 18 Q. B. D. 222.

(e) *West v. Diprose*, [1900] 1 Ch. 337.

(f) 18 Q. B. D. 489.

(g) 39 W. R. 510.

(h) *Gibbs v. Parsons*, L. J. (Notes), 1887, p. 96.

(i) *Blaiberg v. Beckett*, 18 Q. B. D. 96.

(k) *Thomas v. Kelly*, 13 App. Cas., at p. 517.

(l) *Blankenstein v. Robertson*, 24 Q. B. D. 543; *Parsons v. Brand*, 25 Q. B. D. 110; *Coulson v. Dickinson*, 25 Q. B. D. 110.

(m) *Davies v. Jenkins*, [1900] 1 Q. B. 133.

(n) *Simmons v. Woodward*, [1892] A. C. 100.

(o) *Bird v. Davey*, [1891] 1 Q. B. 29.

(p) *Sharp v. McHenry*, 38 Ch. D. 427; *Simpson v. Charing Cross Bank*, 34 W. R. 568; *Edwards v. Marcus*, [1894] 1 Q. B. 587. But a mere unauthorized attempt by the bill of sale holder *ex post facto* to enforce on the grantor certain rules and regulations on which he conducted his business was held not to be a collateral instrument so as to avoid the bill. *Linfoot v. Pockett*, [1895] 2 Ch. 835. And see also *Petit v. Lodge & Harper*, [1908] 1 K. B. 744, overruling *Reed v. Franks*, 16 T. L. R. 347.

(q) *Monetary Advance Co. v. Cater*, 20 Q. B. D. 785.

101. The provisions of the Act avoiding bills of sale given to secure less than 30l., cannot be evaded by a prior understanding that 30l. shall be advanced and that part of it shall be immediately returned to the lender (*r*). But *if the transaction is not a sham* in order to evade the Act, the mere fact that part of the money is immediately returned by the borrower will not of itself avoid the bill (*s*).

Paragraphs
101—102

Bills to
secure less
than 30l.

102. The result of the authorities as to what is a sufficient statement of the consideration for a bill of sale under the 8th section of the Act of 1878, (and which are now applicable to the corresponding provision in the 8th section of the Act of 1882), may be stated as follows:—The real consideration need not be set forth with strict accuracy, but the facts as to the consideration must be stated with substantial accuracy, either as to their legal effect or as to their mercantile and business effect (*s*); but it is not necessary to set forth any arrangement relating to the mode of its payment to, or application for, the benefit of the borrower. A statement of payment of the consideration to the borrower, at the execution of the deed, is consistent with its application in the payment of a *bonâ fide* debt due from him at the time of the transaction, either to the lender himself or to other persons (*t*). But it must be a debt actually payable at the time, and it must be paid. Therefore it must not be retained, or paid for rent or interest which has not yet become due, or which is not paid till after the execution of the deed (*u*); nor for the costs of preparing and executing the bill of sale, which, though properly payable by the mortgagor, are not due till the completion of the transaction after the execution of the deed (*x*). But the fact that the costs were as a matter of fact paid immediately after the execution of the bill (where there was no antecedent agreement) did not avoid the bill (*y*). The amount of acceptances already given by the grantor to the grantee and *which are still running* cannot be retained; nor a sum agreed to be paid by the grantor to the grantee

What is
sufficient
statement
of the con-
sideration.

(*r*) *Davis v. Usher*, 12 Q. B. D. 490.

(*s*) *Per* BRETT, L.J., *Credit Co. v. Pott*, 6 Q. B. D. 295, 299; and see *Roberts v. Roberts*, 13 Q. B. D. 794, where the consideration was very inaccurately but yet sufficiently stated.

(*t*) *Exp. National Mercantile Bank, re Haynes*, 15 Ch. D. 42; *Credit Co. v. Pott*, 6 Q. B. D. 295; *Hamlyn v. Betteley*, 5 C. P. D. 327; *Exp. Challinor, re Rogers*, 16 Ch. D. 260; *Carrard v. Meek*, 50 L. J. Q. B. 187; *Exp. Firth, re Cowburn*, 19 Ch. D. 419; *dist. in Exp. Hunt, re Cann*, 13 Q. B. D. 36; *Exp. Bolland, re Roper*, 21 Ch. D. 543; *Thomas v. Searles*, [1891] 2 Q. B. 408; *Re Davies, Exp. Equitable Investment Co., Ltd.*, 77 L. T. 567.

(*u*) *Exp. Charing Cross Advance and Deposit Bank re Parker*, 16 Ch. D. 35, *Exp. Rolph, re Spindler*, 19 Ch. D. 98.

(*x*) *Exp. Firth, Re Cowburn*, 19 Ch. D. 419; notwithstanding *Exp. Challinor, re Rogers*, 16 Ch. D. 260; *Richardson v. Harris*, 22 Q. B. D. 268.

(*y*) *Saunders v. White*, [1901] 1 Q. B. 70, affirmed but on a different point, [1902] 1 K. B. 472.

Paragraphs
102—104

for the hire of the furniture assigned by the bill for a period of three months (z).

So if the whole sum which forms the consideration, be all paid to be paid, but part be retained for commission, it will be bad, because the whole consideration for which security is given and upon which interest is to be paid, has not come to the hands of the borrower (a). But this is not so where the liability is to a third party and not the grantee (b). The expression "in hand paid" will, however, cover a payment made before the execution, if it were made as part of the transaction (c).

Attestation.

103. With regard to attestation, it is essential to the validity of the bill that the attesting witnesses should be correctly described in the attestation itself (d).

Registration
of bill given
by way of
security is
now essential
to its
validity.

104. The grantee of chattels acquired a good title to them under the Act of 1878, if, without registering the bill of sale, he took and kept possession of the chattels within seven days from its execution; or if, not taking possession, he registered the bill of sale within the seven days (e). If he neither registered within the seven days nor took possession, the bill of sale, if the chattels remained in the possession, or apparent possession, of the maker (but not if in the possession of the sheriff (f)), became void against the persons mentioned in the 8th section of the Act, but not against the grantor (g). This provision is, however, repealed by the 15th section of the Act of 1882, and now every bill of sale given by way of security for money (h) must be registered within seven clear days after the execution thereof; or, if it is executed in any place out of England, then within seven clear days after the time at which it would in the ordinary course of post arrive in England, if posted immediately after the execution thereof, otherwise such bill of sale shall be void in respect of the personal chattels comprised therein; thus leaving open the mortgagee's remedies in respect of any other property comprised in the security, and in respect of the debt and of the covenants which it contains or implies.

The effect of this enactment appears to be that, although seven days are allowed for registration, the necessity for registering the bill of sale cannot, as under the former Acts, be avoided by taking

(z) *Richardson v. Harris*, *supra*, and see also *Darlow v. Bland*, [1897] 1 Q. B. 125.

(a) *Hamilton v. Chaine*, 7 Q. B. D. 319.

(b) *Re Wiltshire, Exp. Eynon*, [1900] 1 Q. B. 96.

(c) *Hamilton v. Chaine*, 7 Q. B. D. 1.

(d) *Parsons v. Brand*, 25 Q. B. D. 110.

(e) *Marples v. Hartley*, 7 JUR. (N.S.) 446; *Exp. Harris, re Pulling*, L. R. 8 Ch. 48; *Exp. Saffery, re Brenner*, 16 Ch. D. 668; *Ashton v. Blackshaw*, L. R. 9 Eq. 510.

(f) *Re Eales, Exp. Steel*, 54 W. R. 202.

(g) *Davis v. Goodman*, 5 C. P. D. 128.

(h) As to the effect of non-registration of an absolute Bill of Sale, see *Antoniadi v. Smith*, [1901] 2 K. B. 589, and *Hopkins v. Gudgeon*, [1906] 1 K. B. 690.

possession before the expiration of the seven days ; because, not only does the bill of sale become void as to the chattels for want of registration, but the grantee is prevented by s. 7 of the Act of 1878 from taking possession except by reason of defaults which could hardly occur within the seven days without collusion.

Paragraphs
104—106

105. Even though the bill of sale be registered (*i*), the goods, if not already seized by the grantee, will pass to the grantor's trustee in bankruptcy, under the order and disposition clause (s. 44) of the Bankruptcy Act, 1883, where the goods are in the possession, order and disposition of the bankrupt *in his trade or business* (*k*) ; the section (20) of the Bills of Sale Act, 1878, which excluded the order and disposition clause of the Bankruptcy Act, 1869, having been repealed by the Act of 1882 (s. 15). Where, however, in cases under the Bankruptcy Act, 1883, the goods are not in the grantee's order and disposition *in his trade or business*, the Act will not prevent the grantee from seizing the goods on the bankruptcy of the grantor, under s. 7 of the Bills of Sale Act, 1882. (**124-132.**)

Registration is no protection if the goods are not seized before mortgagor's bankruptcy.

106. By s. 10 (2) of the Act of 1878, the bill of sale with every schedule or inventory thereto annexed, or therein referred to, and a true copy of the bill, and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, with an affidavit of the time of its being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued (*l*)), and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed with, the Registrar (*i.e.*, one of the masters of the Supreme Court, in the Bills of Sale department at the Central Office (*m*)) within seven clear days after the *making* or giving of the bill of sale (**104**), in like manner as a warrant of attorney in any personal action given by a trader is by law required to be filed (**492**) ; the registration being valid where the time for registering expires on a Sunday, or other day on which the Registrar's office is closed, if made on the next following day on which the office is open (*n*).

The mode of registering bills of sale.

(*i*) *Exp. Harding, re Fairbrother*, L. R. 15 Eq. 223. But this does not apply to bills executed prior to the Act of 1882 : *Exp. Izard, re Chapple*, 23 Ch. D. 409 ; *Hickson v. Darlow*, 23 Ch. D. 690.

(*k*) See *Re Elliott, Exp. Trustee*, 84 L. T. 325.

(*l*) The provision as to the setting forth the residence and occupation applies to the affidavit required in registering all bills of sale, and not merely to such as are given in the execution of any process. *Pickard v. Marriage*, 1 Ex. D. 364 ; 45 L. J. Ex. 594.

(*m*) Act of 1878, s. 13 ; Rules, 1883, Ord. LXI., 1, 25. For form of affidavit, see Appendix to Rules, B. No. 24.

(*n*) Act of 1878, s. 22.

Paragraphs
106—108

The duties of the registering officer are ministerial only, and he has no power to examine into objections of the affidavit (o).

What is a
sufficient
copy for
purposes of
registration.

107. The copy of the bill of sale need not be an exact copy. It is sufficient if it be so far a true copy that no one can be misled by it (p). And if the copy which is filed is a true copy of the original bill the registration will be good, although before it took place the bill of sale was altered; because the property passed to the grantee when it was executed and cannot be affected by the subsequent alteration (q). The omission of the date from the filed copy does not necessarily make the bill invalid (r); nor the omission of the grantor's signature and the signature, address and description of the attesting witness when they appear in the filed affidavit (s).

Contents of
statutory
affidavit.

108. The affidavit must state that the bill of sale was duly attested—i.e., that the deponent was present and witnessed the due execution (t); and it must be made by the attesting witness; but it need not state expressly that the deponent was the witness. So, as his residence and occupation must appear on the face of the bill itself (u), it need not appear in the body of the affidavit; it being sufficient if, on the face of the bill and affidavit, the deponent and the attesting witness were obviously the same person (x).

The residence and occupation required by the statute to be set forth, are those which exist at the time of swearing the affidavit, and must not (where there has been a change) be those which existed at the time of making the bill of sale (y); and if a bill of sale was made by more than one person, all the makers must be described, though only one was in possession of the chattels (z). Although the object is, that the registration of the bill of sale should be good *quoad* the grantor, whose credit will be affected by it, yet it has been held that an error in his christian name, purposely made, does not vitiate the registration (a), although an error in his address and description will do so (b), for the Act does not require his name to be correctly stated. Moreover, the insertion of the grantor's true name, although

(o) *Needham to Johnston*, 8 B. & S. 190; 15 W. R. 346.

(p) *Re Hewer, Exp. Kahen*, 21 Ch. D. 871.

(q) *Green v. Attenborough*, 34 L. J. Ex. 88; 3 H. & C. 468.

(r) *Thomas v. Roberts*, [1898] 1 Q. B. 657.

(s) *Coates v. Moore*, [1903] 2 K. B. 140.

(t) *Sharpe v. Birch*, 8 Q. B. D. 111; *Ford v. Kettle*, 9 Q. B. D. 139.

(u) *Parsons v. Brand*, 25 Q. B. D. 110.

(x) *Routh v. Roublot*, 28 L. J. Q. B. 240; *Blaiberg v. Parke*, 10 Q. B. D. 90. Directors of a company, who sign the bill of sale in order to authenticate the seal, are not attesting witnesses within the Act of 1878. *Shears v. Jacob*, L. R. 1 C. P. 513; *Deffell v. White*, L. R. 2 C. P. 144.

(y) *Button v. O'Neill*, 4 C. P. D. 354, notwithstanding *London & Westminster Loan Co. v. Chase*, 12 C. B. (N.S.) 730. But see *Re Hewer, Exp. Kahen*, 21 Ch. D. 871.

(z) *Hooper v. Parmenter*, 10 W. R. 648.

(a) *Downs v. Salmon*, 20 Q. B. D. 775.

(b) *Lee v. Turner*, 20 Q. B. D. 773.

it was not that which he commonly used, was held not to affect the bill notwithstanding that it was prejudicial to persons searching the register (c). It is immaterial if the copy of the bill of sale contain an error in the name of the *grantee*, as a person searching for the name of the grantor cannot be misled by it (d).

Paragraph
108

Both in the case of the maker of the bill and of the attesting witness, the place of employment may stand for the place of residence (e); or even a club address to which letters may be sent, with the certainty that they will be received (f). And if the grantor has several addresses, the principal one will be sufficient (g), and it will be sufficient if the description of the witness be given in his description as deponent, or if it refer to the description set forth in the bill of sale as the true description (h).

The object of the Act being to enable it to be ascertained, by looking at the register, whether a bill of sale has been executed, and to enable persons claiming against the bill of sale to find the attesting witness, an inaccurate description will be fatal (i). But if that which ought to be described, is described with convenient certainty, the registration will not be vitiated by an addition which is not necessary, and which, though erroneous, is not calculated to mislead, because *utile per inutile non vitiatur* (k).

It is not enough to state what occupation the grantor "lately" followed; his present occupation (l) must be stated; and where he has no occupation it is not sufficient to leave a blank (m). And although a person who has no present occupation may well be described as a gentleman, the description of "gentleman" or "esquire" (n) is improper for one who has a distinct occupation, and even, it seems, for a solicitor, though a solicitor's proper legal description is, or was, "gentleman" (o). Thus the description of a dressmaker's manager as "a married woman" has been held

(c) *Stokes v. Spencer*, [1900] 2 Q. B. 483.

(d) *Gardnor v. Shaw*, 19 W. R. 753.

(e) *Blackwell v. England*, 27 L. J. Q. B. 124; 3 Jur. (N.S.) 1302; *Attenborough v. Thompson*, 2 H. & N. 559. See *Exp. Breull, re Bowie*, 16 Ch. D. 484.

(f) *Dolcini v. Dolcini*, [1895] 1 Q. B. 898.

(g) *Greenham v. Child*, 24 Q. B. D. 29.

(h) *Sladden v. Sergeant*, 1 F. & F. 322; *Banbury v. White*, 2 H. & C. 300.

(i) *Larchin v. North Western Deposit Bank*, L. R. 10 Ex. 64; *Murray v. Mackenzie*, L. R. 10 C. P. 625; *Lamb v. Bruce*, 45 L. J. Q. B. 538; *Proctor v. Lucius*, 19 T. L. R. 458.

(k) *Hewer v. Cox*, 6 Jur. (N.S.) 1339; 3 El. & El. 428; *Blount v. Harris*, 4 Q. B. D. 603; *Exp. McHattie, re Wood*, 10 Ch. D. 398; *Lamb v. Bruce*, 45 L. J. Q. B. 538; *Exp. Popplewell, re Storey*, 21 Ch. D. 73.

(l) *Castle v. Downton*, 5 C. P. D. 56. And see *Proctor v. Lucius*, 19 T. L. R. 458.

(m) *Sims v. Trollope*, [1897] 1 Q. B. 24.

(n) *Morewood v. South Yorkshire Rail. Co.*, 3 H. & N. 798; *Gray v. Jones*, 14 C. B. (N.S.) 743; *Smith v. Cheese*, 1 C. P. D. 60.

(o) *Tuton v. Sanoner*, 3 H. & N. 280; *Brodrick v. Scale*, L. R. 6 C. P. 98; *Exp. Hooman, re Vining*, L. R. 10 Eq. 63; see *Larchin v. North Western Deposit Bank*, L. R. 10 Ex. 64.

Paragraphs insufficient (*p*). But the question is one of degree in each case (*q*).
 108—110 Thus a sleeping partner in a business may properly be described as “gentleman” (*r*); and the description “government clerk” is sufficient without stating the particular office in which he is employed; and “insurance clerk” is a good description for a clerk in an insurance office (*s*). But the description of the salaried manager of a business as “carrying on the business under the style or firm of A. & Co.,” has been held to be bad (*t*).

The occupation and residence must be described in the affidavit, and will not be sufficiently described by reference to the bill of sale (*u*); though an imperfect description in the affidavit has been allowed to be supplemented by the annexed copy of the bill of sale (*x*). It will be sufficient if the deponent describe it to the best of his belief (*y*).

A defect in the *jurat*, *ex. gr.*, where the commissioner before whom the affidavit was sworn did not describe himself as a commissioner, is immaterial (*z*). The commissioner must not be the grantee’s solicitor (*a*). It is not necessary to state in the affidavit where the goods are (*b*).

Certificate of registration not conclusive evidence of completeness of affidavit.

109. A certificate under the seal of the court, of the filing of the affidavit, and copy bill of sale, is not sufficient evidence of the completeness of the affidavit, an office copy of which, and a copy of the bill of sale certified to have been filed, must be produced (*c*). And a certificate of the registration of the bill of sale is not evidence of the filing of the affidavit (*d*). And a certificate of registration is not sufficient evidence of the due registration of the bill of sale, without a certified copy of the registered document (*e*).

Local registration where grantor lives outside London.

110. The Act of 1882 (s. 11) provides, that where the affidavit required by s. 10 (2), (1878), describes the residence of the person making or giving the same, or of the person against whom the process is issued, to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, *i.e.*, the city of London and

(*p*) *Kemble v. Addison*, [1900] 1 Q. B. 430

(*q*) *Neverson v. Seymour*, 97 L. T. 788.

(*r*) *Feast v. Robinson and Fisher*, [1894] W. N. 14.

(*s*) *Grant v. Shaw*, L. R. 7 Q. B. 700. And see *Lamb v. Bruce*, 45 L. J. Q. B. 538.

(*t*) *Cooper v. Davis*, 32 W. R. 329.

(*u*) *Pickard v. Bretz*, 5 H. & N. 9; *Hatton v. English*, 7 El. & Bl. 94. But see *Banbury v. White*, 9 Jur. (N.S.) 913; *Foulger v. Taylor*, 5 H. & N. 202; *Wallis v. Smith*, W. N. (1882), p. 77.

(*x*) *Jones v. Harris*, L. R. 7 Q. B. 157.

(*y*) *Roe v. Bradshaw*, L. R. 1 Ex. 106.

(*z*) *Exp. Johnson, re Chapman*, 26 Ch. D. 338.

(*a*) *Baker v. Ambrose*, [1896] 2 Q. B. 372.

(*b*) *Exp. Hill, re Lane*, 17 Q. B. D. 74.

(*c*) *Emmott v. Marchant*, 3 Q. B. D. 555 (Act of 1854).

(*d*) *Mason v. Wood*, 1 C. P. D. 63 (Act of 1854).

(*e*) *Halkett v. Emmott*, 47 L. J. Q. B. 436.

the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any county court described as a metropolitan county court in the list contained in the second schedule to the Act (*f*), or where the bill of sale describes the chattels enumerated (? specified) therein as being in some place outside the said district, the registrar, under the Act of 1878, shall forthwith, and within three clear days after registration in the principal registry, and in accordance with the directions prescribed by the rules made under the Act, transmit an abstract in the prescribed form, of the contents of the bill of sale, to the county court registrar in whose district such places are situate; and if such places are in the districts of different registrars, to each such registrar. And every abstract so transmitted shall be filed, kept, and indexed by the registrar of the county court in the manner prescribed by the rules, and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered, in the like manner and upon the like terms as to payment or otherwise, as near as may be, as in the case of bills of sale registered by the registrar under the Act of 1878.

Paragraphs
110—112

111. By the 14th section of the Act of 1878 any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale, or an affidavit of renewal thereof, within the time prescribed by the Act, or the omission or mis-statement of the name, residence or occupation of any person was accidental, or due to inadvertence, may, in his discretion, order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence or occupation, or by extending the time for such registration, on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct (*g*). This power is, however, restricted to rectification of the "register"; and therefore, where the filed *affidavit* is incorrect, the judge has no power to allow a supplemental affidavit to be filed (*h*). The time for registration cannot be extended so as to defeat the vested right of an execution creditor (*h*). Extension of
time for
registering
bill of sale.

112. The Acts provide for the mode of registration and renewal, and the manner of keeping the register (*i*), and for the rights to search for and obtain office copies or extracts of registered bills of sale and affidavits, which are made *primâ facie* evidence of the documents and of the fact and date of registration as shown thereon (*k*); and Provisions as
to keeping
and
inspecting
register.

(*f*) Bankruptcy Act, 1869, s. 60. The 96th section of the Bankruptcy Act, 1883, and the third schedule to that Act correspond with the 60th section and the 2nd schedule of the Act of 1869.

(*g*) As to the validity of such an order after an Act of Bankruptcy by the grantor, see *re Parke*, 13 L. R. Ir. 85.

(*h*) *Crew v. Cummings*, 21 Q. B. D. 420.

(*i*) Act of 1878, s. 12.

(*k*) *Ib.* s. 16; Act of 1882, s. 16.

Paragraphs
112—115

for other matters connected with the swearing of affidavits, the fees, and the making of rules for the purposes of the Act (*l*).

As to the priorities of registered bills of sale, see (1283).

Renewal of
registration
every five
years
necessary.

113. By the 11th section of the Act of 1878 the registration must be renewed once at least every five years ; and if five years elapse from the registration, or renewed registration, without a renewal or further renewal (as the case may be), the registration becomes void and the bill fails even as against the grantor (*m*). The renewal is equally imperative, whether the bill remains in the hands of the original grantee or has been assigned to a third party (*n*). The renewal of the registration is effected by filing with the registrar an affidavit (which may be in the form set forth in Schedule A to the Act), stating the date of the bill of sale, and of the last registration thereof, and the names, residences and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security. Under this enactment, if the description in the bill of sale be wrong, the proper course is to state the mistake, and to give the true description in the affidavit filed on re-registration. If the true description be merely given in the affidavit, there will not be a compliance with the 11th section, and the variance between the affidavit and the bill of sale will be fatal to the latter (*o*). A judge has no jurisdiction under s. 14 of the Act of 1878 to extend the time for renewed registration (*p*).

Registration
is not
necessary on
transfers of
bills of sale
except in
respect of
further
advance.

114. The 11th section also provides, that a renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale. If a further sum be advanced on a transfer, the latter will be valid without registration to the extent of the original debt ; and it was held, though the point was left open by the Court of Appeal, that where part of the debt had been paid off, and the new advance only made up the debt to the original amount, the security would be good for the whole debt without further registration (*q*).

SUB-SECTION (4).—*Additional conditions, non-compliance with which avoids a bill of sale given by way of security for money, as against the grantor's creditors, but not as against the grantor himself.*

Bill void
against
grantor's
creditors
in respect of
(1) personal

115. The Act of 1882 (s. 4) also provides, that every bill of sale shall have annexed thereto, or written thereon, a schedule containing an inventory of the personal chattels comprised in the bill of sale ; and such bill of sale, save as after-mentioned, shall have effect *only*

(*l*) Act of 1878, ss. 17, 19, and 21.

(*m*) *Fenton v. Blythe*, 25 Q. B. D. 417.

(*n*) *Karet v. Kasher Meat Supply Association*, 2 Q. B. D. 361.

(*o*) *Exp. Webster, re Morris*, 22 Ch. D. 136.

(*p*) *Re Emery, Exp. Official Receiver*, 21 Q. B. D. 405.

(*q*) *Horne v. Hughes*, 6 Q. B. D. 676.

in respect of the personal chattels specifically described in the said schedule ; and shall be void except as against the grantor, in respect of any personal chattels not so specifically described. And by s. 5 the bill will also be void except as against the grantor, in respect of any personal chattel specifically described in the schedule of which the grantor was not the true owner at the time of the execution of the bill of sale. But by s. 6 it will not, by virtue of the foregoing provisions, be void in respect of—

Paragraph
115

chattels not
scheduled to
the bill, and
(2) personal
chattels of
which
grantor was
not true
owner.

(1) Any growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed.

(2) Any fixtures separately assigned or charged, and any plant or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant (r), or trade machinery, specifically described in the schedule to such bill of sale.

The Act, therefore, makes a schedule containing an inventory of the chattels a necessary part of the bill of sale ; wherein it differs from the Act of 1878, which in providing for the mode of registration, s. 10 (2), only required that every schedule or writing, when it existed, should be registered.

It seems impossible to put a sensible construction upon the 4th section, without changing the position of the words ; for the declaration that the bill of sale shall have effect only in respect of the personal chattels specifically described in the schedule to it, is not consistent with the subsequent implication that it shall operate against the grantor in respect of personal chattels not so specifically described.

The meaning is, perhaps, this. The Act and form seem to require a schedule containing an inventory in every case, not merely as against creditors but even as against the grantor, and if the latter part of the 4th section be read as follows : “ such bill of sale . . . shall have effect only in respect of the chattels specifically described, and shall be void in respect of any personal chattels not so described, except as against the grantor ” (so that the exception governs the whole sentence), the effect of the 4th and 5th sections will be, that the bill of sale will only affect other persons than the grantor in respect of those chattels specifically described, of which the grantor was the true owner at the time of the execution of the bill of sale. But as to those specifically described, of which he was not then but may afterwards become the true owner, and as to those of which only a general and not a specific description is given, the bill of sale will operate only as against the grantor ; and to this extent the Act does

(r) This word does not include live stock : *London and Eastern Counties Loan and Discount Co. v. Creasy*, [1897] 1 Q. B. 768.

Paragraphs
115—117

not interfere with the assignment by registered bill of sale of after-acquired property.

What
amounts to
specific
description.

116. What will amount to a specific description is in some cases very doubtful, but in *Carpenter v. Deen (s)*, *Fry*, L.J., said, “I do not think we have any occasion to enter into a discussion of the word ‘specifically.’ It seems to me, we should look at the scope and object of the section. They are in my opinion plain. I think they are to facilitate the identification of the articles enumerated in the schedule with those that are to be found in the possession of the grantor: that is to say, to render the identification as easy as possible and to render any dispute as to the intention of the parties as rare as possible, and to shut the door to fraud and controversy, which almost always arise when general descriptions are used. That is to be done as far as possible; by which I mean, so far as is reasonably possible—so far as a careful man of business, trying to carry the object of the Act into execution, could and would do, without going into unreasonable particulars . . . The necessary description would differ in various cases. Suppose the owner of twenty or thirty wild ponies on Exmoor was to comprise them in a bill of sale; I do not suppose it would be necessary to give an exact description of every one of those small creatures; but if the schedule comprised six valuable race horses, I think one would expect, and rightly expect, a more exact description of the animals, and greater assistance in the identification of them. The same observations would apply to horned cattle. For cattle on the hills a general description would do; but if a man had three or four shorthorns with valuable pedigrees, I think one would require particularity in their description. The meaning of the Act is, that you must take reasonable care in the description of the subject-matter in the schedule.” Thus, for instance, “21 milch cows” is not sufficiently specific, without saying where they are, or attempting some sort of identification of them (*t*); nor is a description of paintings by the words “at 47, Mortimer Street, 450 oil paintings in gilt frames, 300 oil paintings unframed, 50 water colours in gilt frames, 20 water colours, unframed, 20 gilt frames” (*u*). But on the other hand, “roan horse, Drummer, brown mare and foal, and three rude carts” has been held to be a sufficiently specific description, in the absence of evidence showing that such a description was insufficient to enable the chattels to be identified (*x*).

What
amounts to
true owner-

117. With regard to the question whether the grantor was true owner of the chattels at the execution of the bill, the section avoids

(*s*) 23 Q. B. D. 566, 574.

(*t*) *Carpenter v. Deen*, 23 Q. B. D. 566, explaining *Roberts v. Roberts*, 13 Q. B. D. 794; and see also *Davies v. Jenkins*, [1900] 1 Q. B. 133.

(*u*) *Witt v. Banner*, 20 Q. B. D. 114.

(*x*) *Hickley v. Greenwood*, 25 Q. B. D. 277.

(except as against the grantor) (1) bills of sale of future acquired chattels, and (2) bills of sale of chattels in which the grantor has no legal or beneficial interest.

Paragraphs
117—120

ship of the
chattels.

118. With regard to future acquired chattels, a general assignment of future acquired chattels is absolutely void even as against the grantor, under s. 9 of the Act of 1882, because such an assignment cannot be made in accordance with the statutory form (*y*) ; but a bill of sale of specific chattels which in fact do not belong to the grantor at the date of the deed, but of which he subsequently acquires the ownership, would be good *as against the grantor* by virtue of the doctrine of estoppel. By this section, however, such an assignment would be as void as against the grantor's creditors, etc.

Bill of sale
of future
acquired
chattels void.

119. With regard to the second class of cases to which the section applies, where A. absolutely assigned chattels to his wife for her separate use, and they were removed to the residence of the lady's son with whom she resided, and subsequently A. granted a bill of sale of them by way of security to B., it was held that, although the assignment to the wife was, as a matter of fact, void as against A.'s creditors, it was not void as against A. himself, and that consequently the bill given by way of security to B. was void because A. was not the true owner of the chattels (*z*).

Bills of sale
of chattels
not belong-
ing to
grantor.

The section does not, however, mean that the grantor must be the absolute and only owner. It is sufficient if he has a partial or equitable ownership. Thus where chattels are settled to the use of A. and B. jointly during their lives with remainder to the survivor absolutely, a bill by one of them is good to the extent of his beneficial interest (*a*) ; and similarly a bill of sale of the equity of redemption in chattels is good (*b*).

On the other hand, it would seem that the ownership need not be beneficial ; and where a person advanced money in good faith and without notice to one who was the *legal* owner of chattels but held them in trust for another, a bill of sale by the trustee was held to be good (*c*).

SUB-SECTION (5).—*How far a bill of sale is avoided in toto by the Acts, or only in part.*

120. The eccentric language of the Act of 1882 has given rise to considerable discussion as to whether a bill of sale is wholly or partially avoided by the Acts.

Under what
circum-
stances bill
void only as

(*y*) *Thomas v. Kelly*, 13 App. Cas. 506.

(*z*) *Tuck v. Southern Counties Deposit Bank*, 42 Ch. D. 471.

(*a*) *Exp. Pratt, re Field*, 63 L. T. 289 ; *Exp. Barnett, re Tamplin*, 62 L. T. 264.

(*b*) *Usher v. Martin*, 24 Q. B. D. 272 ; *Thomas v. Searles*, [1891] 2 Q. B. 408 ; 65 L. T. 39 ; 60 L. J. Q. B. 722 ; *Exp. Barnett, re Tamplin, supra*.

(*c*) *Re Sarl, Exp. Williams*, [1892] 2 Q. B. 591.

Paragraphs
120—122

regards
personal
chattels com-
prised in it.

A careful study of the language shows that the Act makes a bill void only *in respect of any personal chattels comprised therein* in the following cases, viz. :—

- (a) Insufficient attestation (*d*).
- (b) Non-registration (*e*).
- (c) Insufficient setting forth of the true consideration (*f*).
- (d) As against creditors, etc., in respect of chattels not the property of the grantor at the execution of the bill (*g*).
- (e) As against creditors in respect of chattels not specifically described in the bill (*h*).
- (f) In respect of chattels seized under a distress for rent by virtue of an attornment clause or power of distress (*i*).

Under what
circum-
stances
totally void.

121. On the other hand the Acts in terms appear to make the bill void *in toto* in the following cases, viz. :—

- (a) Where it does not comply with the statutory form (s. 9).
- (b) Where the consideration is under 30*l.* (s. 12).

Even where
bill totally
void the
entire
document
which
contains it
may not be so.

122. It must not, however, be assumed that even in these two cases the entire *document* is void, for although where you cannot sever the illegal from the legal part of a document the document is altogether void, yet where you can sever them (whether the illegality be enacted by statute or by the common law) you may neglect the bad part and retain the good (*k*). A security given on properties A. B. and C. is a security for the whole amount on each of these properties or on every part of each of them. The excision of one property, in law by a statute, or in fact by an earthquake, effects a separation between the properties and withdraws that one of them from the operation of the instrument, but leaves the instrument intact and still operative as regards the rest (*c*). Consequently, it has been held that a bill not complying with the form, or for which the consideration was less than 30*l.*, is only void so far as it is a bill of sale and *not so far as it is a mortgage of other property*. How far such a document is and how far it is not a bill of sale, is however, a question of some difficulty. Where it is merely a security on personal chattels it would seem that it is void *in toto* not only as a security but also as a deed of covenant, for the covenants are part and parcel of the bill (*l*). But where on the other hand it is also a security on other properties (*ex. gr.*, a machine of that kind, which by s. 5 of the Act of 1878, is excluded from the definition of personal

(*d*) Act of 1882, s. 8.

(*e*) *Ib.* and *Heseltine v. Simmons*, [1892] 2 Q. B. 547.

(*f*) Act of 1882, s. 5.

(*g*) *Ib.* s. 4.

(*h*) Act of 1878, s. 6.

(*i*) *Per* WILLES, J., *Pickering v. Ilfracombe Rail. Co.*, L. R. 3 C. P. at p. 250.

(*k*) *Per* FRY, L.J., in *Exp. Byrne, re Burdett*, 20 Q. B. D. 310, 315.

(*l*) *Davies v. Rees*, 17 Q. B. D. 408.

chattels(*m*) or the benefit of a hire-purchase agreement in relation to the personal chattels(*n*) it will be good *qua* such other property. It has however been held that the grantor of a bill of sale invalid as not stating the true censors who has concurred in and taken advantage of the successful assertion against a third party of the bill's validity is estopped from subsequently setting up the invalidity against the grantee(*o*). The distinction as explained by *Fry*, L.J., in *Exp. Byrne, re Burdett (m)* is this, "the 9th section (of the Act of 1882) made the whole of a 'bill of sale' as those words were used in the section, and not merely the assignment contained in it, void, as was shown by a comparison of the language of the 8th and 9th sections; that the same 9th section showed, by its reference to the schedule, what it meant by a bill of sale; and that on reference to the schedule, it appeared that a covenant to pay was an integral part of the scheduled form, and, therefore, of a bill of sale within that section. There were three possible areas over which the avoidance might operate, viz. :—(1) The assignment of chattels only; or, (2) everything which appeared as part of a bill of sale in the scheduled form; or (3) every part of every instrument in which a bill of sale might be contained. The court rejected the first as too narrow, but did not accept the third, which we think would be too wide."

Paragraphs
122—123

123. It is obviously, however, very unwise to include property other than personal chattels in a bill of sale; because, by doing so, compliance with the statutory form becomes difficult if not impossible(*p*), and the bill of sale *qua* bill of sale is thereby endangered; whereas, by using a collateral security as regards the other property, the security on the personal chattels might be preserved(*q*). But even then, it would not do to incorporate in the collateral security any covenant or conditions relating to the bill of sale, otherwise the registration of the latter might be made void under s. 10, sub-s. (3) of the Act of 1878(*r*).

Necessity of
putting all
collateral
securities in
a separate
instrument.

(*m*) *Exp. Byrne, re Burdett, supra*.

(*n*) *Exp. Mason, re Isaacson*, [1895] 1 Q. B. 333.

(*o*) *Comitti & Son, Ltd. v. Maher*, 22 T. L. R. 121.

(*p*) See *Cochrane v. Entwistle*, 25 Q. B. D. 116. *Swanley Coal Co. v. Denton*, [1906] 2 K. B. 873.

(*q*) See *Carpenter v. Deen*, 23 Q. B. D. 566.

(*r*) *Heseltine v. Simmons*, [1892] 2 Q. B. 547; *Monetary Advance Co. v. Cater*, 20 Q. B. D. 785. *Conf. Oakes v. Green*, 23 T. L. R. 560; *re Leber*, 52 Sol. J. 483.

Paragraphs
124—126

SECTION III.

Of the Effect on Bills of Sale of the Order and Disposition Clause in Bankruptcy.

	PARAGRAPH
<i>Effect of 44th section of Bankruptcy Act, 1883</i>	124
<i>Differs from section in former Act</i>	125
<i>Registration of bill of sale given as security for money, no longer takes chattels out of order and disposition clause</i>	126
<i>Stocks, shares, etc., are excluded from the clause</i>	127
<i>Goods must be in order and disposition of bankrupt in his trade</i>	128
<i>Clause inapplicable to goods held as agent</i>	129
<i>How goods may be taken out of order and disposition of bankrupt</i>	130
<i>Clause inapplicable unless goods remain in order and disposition of bankrupt by consent of true owner</i>	131
<i>Danger of allowing mortgaged chattels to remain long in possession of mortgagor's executor</i>	132

Effect of the
44th section
of the
Bankruptcy
Act, 1883.

124. By the 44th section of the Bankruptcy Act, 1883, the property of the bankrupt divisible among his creditors, comprises all goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: provided that things in action, other than debts due, or growing due, to him in the course of his trade or business (s) shall not be deemed goods or chattels within the meaning of the clause.

Differs from
section in
former Act.

125. The language of this section contains an important variation from the former Act, in which the words "being a trader" stood in place of the present words "in his trade or business" (t). The present Act, therefore, limits the operation of the clause not merely to traders, but also to goods *used in their trade*.

Registration
of bill of sale
given as
security for
money no
longer takes
chattels out
of order and
disposition
clause.

126. It was held before the passing of the Bills of Sale Act, 1878, that the order and disposition clause of the Bankruptcy Act, 1869, was not affected by the registration of bills of sale under the Bills of Sale Act, 1854, and chattels comprised in a registered bill of sale consequently belonged to the creditors of the maker if they were in his order and disposition at his bankruptcy (u). By the 20th section of the Act of 1878, chattels comprised in a bill of sale which has been, and continues to be, duly registered under that Act, shall not be deemed to be in the possession, order or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869.

(s) Contingent claims, which may or may not become debts, are not debts within this clause. *Exp. Kemp, re Fastnedge*, L. R. 9 Ch. 383.

(t) Bankruptcy Act, 1869, s. 15.

(u) *Stansfeld v. Cubitt*, 2 De G. & J. 222, *per* TURNER, L.J.; *Exp. Harding, re Fairbrother*, L. R. 15 Eq. 223. See *Badger v. Shaw*, 6 JUR. (N.S.) 377.

This provision was, however, repealed by the Act of 1882 (s. 15), with regard to bills of sale given by way of security for money (x), but not so as to affect the validity of anything done or suffered before the commencement thereof under the former Act (y); and the law as it existed before the Act of 1878 is therefore restored. The doctrine applies although at the date of the Bankruptcy there had been no default entitling the mortgagee to take possession (z).

Paragraphs
126—128

127. The proviso excluding choses in action from the order and disposition clause, extends to all stocks and shares (a); and even if it did not, it would seem that in the case of ordinary traders (other than bankers, brokers, and other financial persons) stocks or shares could scarcely be said to be in their possession, order or disposition *in the course of their trade or business* (b).

Stocks,
shares, etc.,
excluded
from order or
disposition
clause.

128. In order to entitle the trustee in the bankruptcy or liquidation of the maker of the bill of sale to the chattels comprised in it, the debtor must not only be a trader, and under the Act of 1883 must have the possession, order or disposition of the goods in trade or business, but must at the commencement of the bankruptcy be in the sole possession of such of the goods and chattels as are subject to the clause, as the sole reputed owner of them. The statute applies to cases in which the true owner of the chattels allows them to remain in the hands of another who, by reason of his possession, appears to be, but is not, the owner. It therefore will not apply where furniture, assigned upon marriage to trustees in trust for the separate use of the wife, is in the house occupied by her and her husband at his bankruptcy; the wife being not the apparent but the real owner (c).

Goods must
be in
bankrupt's
order and
disposition in
his trade.

And, where there are several joint owners, each is entitled in his own right; and if one has possession he has it under contract with his co-owners. Therefore the statute does not, in the case of a partnership, vest the property in the trustee in bankruptcy of the partner in possession to the exclusion of the rights of the other partner, even though the latter be a dormant partner, having no apparent interest in the chattels (d).

But, in the case of a dissolution and sale of the partnership estate, the property will be in the order and disposition of the purchaser if he have been let into possession, although no assignment has been

(x) *Swift v. Pannell*, 24 Ch. D. 210; *Casson v. Churchley*, 53 L. J. Q. B. 335.

(y) In the case of bills duly registered before the Act of 1882 (if any still exist), the order and disposition clause does not apply. *Exp. Izard, re Chapple*, 23 Ch. D. 409.

(z) *Re Ginger*, [1897] 2 Q. B. 461; *Re Weibking, Exp. Ward*, [1902] 1 K. B. 713.

(a) *Colonial Bank v. Whinney*, 11 App. Cas. 426.

(b) *Exp. Nottingham, etc., Bank, re Jenkinson*, 15 Q. B. D. 441.

(c) *Simmons v. Edwards*, 16 Mee. & W. 838.

(d) *Reynolds v. Bowley*, L. R. 2 Q. B. 474; *Exp. Dorman, re Lake*, L. R. 8 Ch. 51; *re Bainbridge, Exp. Fletcher*, 8 Ch. D. 218.

Paragraphs
128—129

Section in-
applicable to
goods held
as agent.

made nor any purchase-money paid ; and there is no difference when the sale has been made by the court (e).

129. The statute will also not apply where the goods are held by the bankrupt as agent, if it be shown that he held them as agent, and there was sufficient notice that he generally received goods in that character (f). And the reputation of ownership may be negatived by the custom of trades, proved or known to have existed so long, and to have been so extensively used, that the ordinary trade creditors may be presumed to have known of them. Thus, the clause has been excluded in the case of patterns of a manufacturer in the possession of a retail upholsterer (g). A similar result followed in a case where it was proved that a custom existed at Liverpool that wines and spirits paid for by a purchaser are allowed to remain in bond under the control of the vendor, either in his warehouse or in that of another person, until the purchaser requires them for use and pays the duty, and whether a delivery order has or has not been given to him before the bankruptcy or liquidation of the vendor (h), and a similar custom has been proved as to hops (i). Evidence of customs of dealers in furniture, and of pianofortes, to deliver them upon the terms that they shall vest absolutely in the customer on payment by him of a certain sum by instalments, until payment of all of which they remain vested in the original owner with power to seize them in default of payment, has also been held to exclude the operation of the clause (k). The custom for hotel-keepers and boarding house-keepers (l) to become possessed of furniture upon such terms, is so common and notorious, that it need not now be proved, but the court will take judicial notice of it. And the custom extends not only to furniture in the strictest sense of the word, but to all the articles which are necessary for the furnishing of an hotel for the purpose of using it as such. The effect of the custom is absolutely to exclude the reputation of ownership by the hotel-keeper of all those articles in the hotel, at the time of his bankruptcy, which are within the scope of the custom, *without regard to the question whether the particular articles are or are not hired by him in fact*. Consequently, articles which are his property subject to a valid mortgage by bill of sale, will be excluded from the operation of the reputed ownership clause, and the mortgagee's security will be

(e) *Graham v. McCulloch*, L. R. 20 Eq. 397.

(f) *Exp. Boden, re Wood*, 28 L. T. (N.S.) 174 ; *Re Fawcus, Exp. Buck*, 3 Ch. D. 795 ; *Re Bright, Exp. Smith*, 10 Ch. D. 566.

(g) *Exp. Huggins, re Woodward*, 54 L. T. 683.

(h) *Exp. Watkins, re Couston*, L. R. 8 Ch. 520 ; *Exp. Vaux, re Couston*, L. R. 9 Ch. 602.

(i) *Exp. Dyer, re Taylor*, 53 L. T. 768.

(k) *Exp. Powell, re Matthews*, 1 Ch. D. 501 ; *Re Blanshard, Exp. Hattersley*, 8 Ch. D. 601.

(l) *Re Chapman, Exp. Clark*, 71 L. T. 778.

effectual (*m*). The custom of the agistment of cattle on a farmer's land is also judicially recognized in the same way (*n*). A custom among horse-dealers, for one dealer to entrust another with horses on sale or return, has also been proved, and has been held to exclude the operation of the clause (*o*). But the custom must be clearly proved, and must be shown to be known to persons in the same trade as well as to others who are likely to be creditors (*p*). It does not extend to private persons (*q*), and such an agreement cannot be grafted upon an ordinary sale on credit; because by that transaction the property in the goods has already passed to the debtor, and will so remain unless the original transaction be entirely abrogated (*r*).

Paragraphs
129—131

130. The chattels may be taken out of the order and disposition of the bankrupt not only by possession in the grantee, taken under circumstances which may amount to a fraudulent preference (as if the grantee took possession in consequence of information by the grantor that he was in difficulties (*s*)), but even by means of the friendly possession of a third person, under which the debtor continues to have the use of the goods, subject to the control of the person in possession (*t*). But if the possession of the third person be wrongful, it will not disturb the legal possession of the debtor, or affect the right of the trustee in his bankruptcy (*u*).

How goods
may be taken
out of order
or disposition
of the
bankrupt.

131. The order and disposition clause will not operate, unless the bankrupt holds the goods with the consent of the true owner. The latter may, therefore, defeat the title of the trustee by any act which shows a withdrawal of his consent, as by making *bonâ fide* attempts to get possession before the bankruptcy (*x*), or by merely demanding the goods with a view to taking possession of them, or giving notice to the sheriff who has seized under an execution to withdraw (*y*).

Clause
inapplicable
unless goods
remain in
order or
disposition
by consent
of owner.

The possession of a receiver, appointed on behalf of the plaintiff in an action to enforce an agreement to execute a bill of sale, will also take the goods out of the order and disposition of the defendant (*z*). But the receiver's possession will not be effectual, unless

(*m*) *Exp. Turquand, re Parker*, 14 Q. B. D. 636; *Crawcour v. Salter*, 18 Ch. D. 30.

(*n*) *Exp. Huggins, re Woodward*, 54 L. T. 683.

(*o*) *Exp. Wingfield, re Florence*, 10 Ch. D. 591. See also *Priestly v. Pratt*, L. R. 2 Ex. 101.

(*p*) *Re Hill*, 1 Ch. D. 503, n.; *Exp. Lovering, re Jones (No. 2)*, L. R. 9 Ch. 621.

(*q*) *Exp. Brooks, re Fowler*, 23 Ch. D. 261.

(*r*) *Exp. Orme*, 38 L. T. 328.

(*s*) *Exp. Symmons, re Jordan*, 14 Ch. D. 693.

(*t*) *Exp. National Guardian Assurance Co., re Francis*, 10 Ch. D. 408.

(*u*) *Exp. Edey, re Cuthbertson*, L. R., 19 Eq. 264.

(*x*) *Exp. Harris, re Pulling*, L. R., 8 Ch. 48; *Exp. Montagu, re O'Brien*, 1 Ch. D. 554.

(*y*) *Smith v. Topping*, 5 B. & Ad. 674; *Exp. Foss, re Baldwin*, 2 De G. & J. 230; *Exp. Ward, re Couston*, L. R. 8 Ch. 144.

(*z*) *Taylor v. Eckersley*, 5 Ch. D. 740.

Paragraphs
131—132

the proper certificate that he has complied with the order (if any) requiring him to give security has been given (a) (825). On the other hand, the mere appointment of the receiver of debts due to the bankrupt in his trade or business, is not of itself sufficient to take them out of the order and disposition clause. In order to protect them, it is necessary to give notice of the assignment to the debtors(b).

Danger of
allowing
mortgaged
chattels to
remain long
in possession
of mort-
gagor's
executors.

132. If the holder of the bill of sale allows the goods to remain for an undue period in the hands of the personal representative of the deceased grantor, and to be used by him in carrying on the business of the grantor, the goods will be held to be in the order and disposition of the representative, and will pass to the trustee in his bankruptcy(c).

(a) *Edwards v. Edwards*, 2 Ch. D. 291.

(b) *Rutter v. Everett*, [1895] 2 Ch. 872.

(c) *Kitchen v. Ibbetson*, L. R. 17 Eq. 46.

CANADIAN NOTES

BILLS OF SALE AND CHATTEL MORTGAGES

IN Ontario every mortgage or conveyance intended to operate as a mortgage of goods or chattels which is not accompanied by an immediate delivery and an actual and continued change of possession, must be registered within five days of its execution at the County Court (*a*).

Cases.

The defendant, a constable, levied upon goods and chattels in the possession of S. under an execution issued on a judgment recovered against S. by M. At the time of the levy the goods were covered by a bill of sale to the plaintiff to secure \$150. The document purported on its face to be an absolute transfer, with a right to immediate possession; but it was referred to in the affidavit as a bill of sale, and the evidence showed that there was an understanding not reduced in writing that S. should get the property back on payment of the amount secured. After the filing of the bill of sale the property was allowed to remain in the possession of S.:—Held, that the fact of the property remaining in the possession of the grantor was not a fraud in itself, but a matter for the consideration of the trial Judge, and he having found that the amount named as the consideration was due from the grantor to the grantee, and that the transaction was not tainted with fraud, the amount of

(a) Bills of Sale and Chattel Mortgage Act, R. S. O. (1897), c. 148, s. 2.

property being transferred not being excessive, there was no reason for disturbing his finding. The same principle would apply to the fact that the provision for redemption of the property covered was not reduced to writing. The oral agreement for the return of the property was not a "defeasance" in the sense in which that term is used, and the section of the Act which requires every defeasance to which a bill of sale is subject to be filed with it, was not applicable. The bill of sale having been made and filed prior to the passage of the Bills of Sale Act, 1899:—Held, that it was validly filed subject to the special clause as to the filing of a renewal statement, and the time prescribed for the filing of a renewal statement not having elapsed, that the bill of sale was in no way affected by such provision (b).

For a case bearing on actual and continued change of possession, the rights of execution creditors, consideration, past indebtedness, false statement in bill, and interpleader, see *Mueller v. Cameron* (c), and *Goodyear v. Goodyear* (d).

As to seizure under a chattel mortgage, breach of trust, and damages, see *Watts v. Sale* (e), and *Stevens v. Daly* (f). The following description in a chattel mortgage, "All office fixtures, lamps, desks, chairs, furniture, stationery, and all goods, chattels, and effects now in the store and office of the mortgagors," was held not to include a safe, the general words being restricted by the preceding words (g).

An action was brought for a declaration that a transfer of goods from the defendant to his brother was void under c. 11 of the Acts of 1898, and ss. 1, 3, and 4 of R. S. N. S., 5th ser., c. 92, because it was not filed. By the document in question, the defendant transferred a stock of goods in store to the amount of \$1500, and agreed to pay for the same by paying notes of B. & Co. to the amount of \$500, and by giving ten notes for the balance of \$100 each, one payable every six

(b) *Fraser v. Murray*, 34 L. S. Rep. 186.

(c) (N. W. T.), 2 W. L. R. 524.

(d) 1 O. W. R. 405.

(e) 1 O. W. R. 681; 2 O. W. R. 1020.

(f) 1 O. W. R. 621.

(g) *Goldie v. Taylor*, 2 Terr. L. R. 298.

months. The document concluded: "The said G. H. to hold the goods in store, and whatever goods may come in after shall become the property of the said G. H., until the said G. H.'s claim is paid in full. If I fail to pay any of the above-named notes, the said G. H. can take over possession of the business and all stock in the said store at time of my failing to meet or pay above or aforesaid-named notes." This document was not filed, and was not accompanied by any affidavit. After G. H. had taken possession of the stock of goods under the power, plaintiffs attached the goods as the property of an absent or absconding debtor, and sought to have the transfer set aside. Held, that the document in question came within the term "bill of sale" as defined by R. S. N. S., c. 92, s. 10, and should have been filed, and was liable to be defeated for non-filing up to the time that G. H. took possession under it. Held, also, that G. H. did not come within the category of a "hirer, lessor, or bargainer," within the meaning of s. 3 of c. 92, and that such section had therefore no application (*h*).

A bill of sale, given in connection with the sale of a business held by the vendor for the benefit and protection of the plaintiff, who had indorsed certain promissory notes given by the vendee in payment of the purchase money, having expired, in consequence of failure to renew it under the provisions of the Act, the plaintiff, in pursuance of an agreement made at the time of the sale, demanded and received a second bill of sale, to secure the amount for which he remained liable in respect of the original indorsements, as well as certain amounts for which he became liable as indorser of other promissory notes. There being no question of insolvency on the part of the maker at the time the second bill of sale was given, and no fraudulent purpose, and the terms of the agreement being accurately set forth:—Held, that there was no pretence for holding the bill of sale void under the statute of Elizabeth; that the fact that the plaintiff had taken possession under his bill of sale and was in possession at the time the sheriff made his levy was sufficient, in the absence of fraud, to enable the plaintiff to maintain his

(*h*) *Manchester v. Hills*, 34 N. S. R. 512; *Trussler Brothers, Ltd. v. Quinn*, 6 O. W. R. 371.

action; and following *Creighton v. Reid* (i) that the affidavit to the bill of sale was not bad because it had been sworn before the solicitor by whom the bill of sale was prepared (l).

A chattel mortgage made in a foreign country upon goods there, which is valid and binding there as against not only the mortgagor, but also subsequent mortgagee and purchasers, is valid and binding to the same extent in the Territories, notwithstanding that the provisions of the Bills of Sale Ordinances of the Territories have not been complied with. Where, therefore, goods then being in a foreign country were comprised in such a mortgage and subsequently removed to the Territories, and there taken by the agent of the mortgagee out of the possession of a *bonâ fide* purchaser for value without notice to the mortgagor, and the latter sued the agent for conversion. Held, that the plaintiff could not succeed (l).

While the indorsing by a person not a party to a note of his name upon it, before it has been indorsed by the payee, is not an indorsement in the legal sense so as to make that person legally liable to the payee, a chattel mortgage to the intending indorser to secure him against the liability intended to be incurred cannot be set aside by the mortgagor's assignee for creditors after the mortgagee has paid the note in question (m).

For purposes of registration of deeds the North-West Territories is divided into districts, and it is provided by Ordinance that registration of a chattel mortgage, not followed by transfer of possession, shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are removed into another district, a certified copy of the mortgage shall be filed in the registry offices thereof within three weeks from the time of removal, otherwise the mortgage shall be null and void as against subsequent purchasers, etc. Held, reversing the judgment in appeal, that the "subsequent purchaser" in such case must be one who purchased after the

(i) 27 N. S. R. 72.

(k) *Mosher v. O'Brien*, 37 N. S. R. 286.

(l) *Bonin v. Robertson*, 2 Terr. L. R. 21; 14 Occ. N. 150.

(m) *Robinson v. Mann*, 21 Occ. L. 375; 2 O. L. R. 63; *Greenburg v. Lenz* (B. C.), 2 W. L. R. 64.

expiration of the three weeks from the time of removal, and that, though no copy of the mortgage is filed as provided, it is valid as against a purchase made within such period (*n*).

As to right of mortgagor to possession see *Clay v. Canada Grocers, Ltd.* (*o*).

V. and C. sold their grocery business, including all their stock-in-trade and book debts, to H. and B., who shortly afterwards gave a chattel mortgage to E., covering the stock-in-trade of the grocery business and also all book debts due to H. and B. in the business carried on by them as grocers. Held, that the book debts originally due to V. and C., and assigned to them by H. and B., were covered by the chattel mortgage (*p*).

Verbal License—Ordinary Course of Business.

The defendant, a farmer, executed a chattel mortgage to M., whereby he assigned all the goods, chattels, and property mentioned in a schedule, and also any and all the property that might thereafter be bought to keep up the same, in lieu thereof and addition thereto either by exchange or purchase. The instrument also contained a proviso that the defendant should remain in possession of the mortgaged property until default, with power to use the same in the ordinary way while so in possession, but with full right, power, and authority to M. to enter and take possession of the property in case of default of payment, or on the death of the defendant, or in the event of the seizure of the property at the suit of any creditor, or in the event of the defendant disposing of or attempting to dispose of or make away with said property or any part thereof without the written consent of M. Included in the property mortgaged was a stallion, which a few months after the execution of the mortgage and before any default on the part of the defendant, but without the written consent of M., he exchanged with the plaintiff for a horse belonging to him. After the exchange the plaintiff, having discovered that the stallion was covered by

(*n*) *Hulbert v. Peterson*, 25 Occ. N. 118; 36 S. C. R. 324.

(*o*) 3 O. W. R. 850.

(*p*) *Robinson v. Empey*, 24 Occ. N. 343; 10 B. C. R. 466.

the mortgage, attempted to avoid the transaction, sending the stallion back to the defendant and demanding the return of his own horse, which the defendant refused to deliver. Held, that, as the mortgage must be taken to contain the whole contract entered into between the defendant and M., the Judge of the Court below was in error in giving any effect to a mere verbal license, which preceded the mortgage and was not in harmony with many of its provisions; and that it was clearly a condition of the mortgage, and the intention of the parties thereto, that the defendant should be allowed to sell or exchange the mortgaged property, provided such sale or exchange had been in the ordinary course of the defendant's business or not was a question of fact which had not been passed upon by the Court below and there should be a new trial in order to have that point determined (q).

In Quebec, the sale of an immovable thing, not followed by change of possession, but made in good faith and without fraud, even if the purpose be to give the article in pledge to the purchaser, transfers the property to him as well as against third persons as between the contracting parties (r).

Where the goods comprised in a bill of sale were within twenty-one days after its execution *bonâ fide* taken possession of by the bargainee, the Bills of Sale Act was held not to apply, and it was immaterial that the bill was subject to a defeasance not contained in it. *Semble*, that a judgment creditor of the bargainors (a partnership) had no *locus standi* to attack the bill on the ground that a member of the firm had no authority to execute the bill on behalf of the firm. Held, that he had implied authority or that his act was ratified, or that his partners were estopped from denying his authority (s).

The defendant, by an agreement in writing, transferred to the opposant, his creditor, the ownership of his furniture, as security for the opposant's claim. The transfer was made subject to a right on the defendant's part to recover the ownership, on paying the amount of his indebtedness, for which he

(q) *McPherson v. Moody*, 35 N. B. R. 51.

(r) *Bergeron v. Campeau*, Q. R. 25 S. C. 26.

(s) *McClary Manufacturing Co. v. Hawland*, 9 B. C. R. 479.

had given the opposant a demand note. By the contract transferring the effects, it was agreed that the opposant should have the right to take possession of the effects if the note were not paid, and that the effects should be left in the defendant's possession until he made default. The note had not been paid, but some small payments had been made on account, and judgment had been obtained by the opposant on the note. The effects transferred having been seized in the defendant's possession by the plaintiff, a judgment creditor, the opposant claimed them as his property, under the transfer. Held, that where there is no evidence of intention to defraud or of simulation a debtor, from whom his creditor demands security, can, for the purpose of furnishing such security, transfer to the creditor the ownership of movable effects, so as to give the latter, without his taking possession of the movables transferred, a good title thereto against creditors of such debtor, including even a creditor anterior to the one whose claim was secured by the transfer (*t*).

The Bills of Sale Ordinance C.O. (1898), c. 43, s. 7, provides that "except, etc., a mortgage . . . may be made in accordance with form A . . ." Form A., in the place intended for the witness's signature, has the words "Add name, address, and occupation of witness." No form of affidavit of execution is given. Held, that neither (1) the omission to state the address and occupation of the witness after his signature, nor (2) the omission of the deponent's name and occupation in the body of the affidavit of execution which was signed by him, nor (3) the omission to state in the jurat a more definite place than "the North-West Territories," rendered the registration of the mortgage invalid. The claimant in interpleader was allowed an adjournment to amend the affidavit supporting his claim (*u*).

A bill of sale of a horse, given to secure a balance due on the purchase price, although unregistered, cannot be defeated by a fraudulent sale to a third party with notice. In an action for the alleged wrongful taking and detention of a horse, defendants relied on an unregistered bill of sale given to the

(*t*) *Creed v. Haensel*, Q. R. 24 S. C. 178.

(*u*) *Commercial Bank of Manitoba v. Fehrenbach*, 4 Terr. L. R. 335.

defendant B. by the owner M. in trust to sell the horse, retain a balance due on the purchase price, and pay the balance to M. Held, that the bill of sale so given, although unregistered, was not defeated by a fraudulent sale to plaintiff, who was not a *bonâ fide* purchaser for value, and who had notice of the claim (x).

In a suit by the mortgagor to set aside a bill of sale by way of mortgage, an interim injunction order to restrain a sale by the mortgagee was granted upon condition of the mortgagor paying into Court the amount due the mortgagee. The bill of sale was collateral security for promissory notes, some of which had been indorsed over for value. Held, that the amount to be paid into Court should not be reduced by the amount of such notes (y).

F. claimed to be the owner of a horse that S. had given her for the board of herself and child. S. being indebted to H. left the Province of H., seized the horse as the property of S., under an absconding debtor's warrant. While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by a person professing to be acting for F., and a bill of sale of the horse was given by them to H., and the horse was returned to F. The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale, and F. brought an action in the Kent County Court against H. for a conversion of the horse. On the trial, the judge told the jury that the only question was, who was the owner of the horse at the time it was taken? and that the plaintiff was not estopped by the bill of sale from recovering in the action. Held, on appeal from a judgment affirming a verdict entered on a finding on this direction, that the direction was right (z).

Under a lease for a year, dated the 6th April, reserving as rent one-third of the crops and providing that the lessee should thresh the grain and draw it to the elevator or cars to be stored and shipped as might be agreed between the parties in the name of the lessor, but fixing no time when that was to be

(x) *M'Leod v. Doucette*, 38 N. S. R. 151.

(y) *Petropolis v. F. E. Williams Co.*, 3 N. B. Eq. 267.

(z) *Hannay v. Fraser*, 37 N. B. R. 39.

done, there is no rent due until the end of the year, and a distress by the landlord in November following is illegal. (2) A distress for rent is unlawful if the tenant is not in possession at the time. (3) A chattel mortgage will not be held void under s. 12 of the Bills of Sale and Chattel Mortgage Act, R. S. M., 1902, c. 11, because the affidavit of *bona fides* made by an agent stated that he had a "knowledge of all the facts connected with the said mortgage" instead of saying in the words of the section, that he was "aware of all the circumstances." (4) It is no objection to a mortgage on growing crops to secure the price of seed grain supplied, that the grain had not been sold to the mortgagor by the mortgagee himself, but was purchased by him for the mortgagor from a third party. (5) Under s. 39 of the Act it is a fatal objection to a mortgage on growing crops or crops to be grown, if it is taken for anything beyond the price of the seed grain furnished and interest thereon (*a*).

Defendant, as bailiff to D., levied upon goods in premises occupied by R. as tenant of D., but which were claimed by plaintiff under a bill of sale given to secure a debt due for services rendered. The evidence showed, and the trial judge found, that the wife of R. being entitled to a sum of money held in trust for her, D. and R. were parties to a misrepresentation to the trustee, as the result of which D. obtained possession of a portion of the money so held in trust, it being agreed between the parties that D. should retain a portion of the money in payment of a debt due to him for professional services, and that the balance should be applied by him in payment of the rent of the premises occupied by R. as tenant of D. It was further shown and found that the amount received by D. was more than sufficient to satisfy the debt due him for professional services, and the rent due up to the time of distress. Held, affirming the judgment appealed from, that as plaintiff was not shown to be a party to the fraud, and was not a privy in any sense which would subject her to its consequences, and as her title to the property in question was founded on a bill of sale given for good consideration, defendant's principal could not be heard to make the contention that the money obtained from the

trustee was received under a fraudulent proceeding to which he himself was a party (b).

A lease of store of premises was obtained by plaintiffs through a guarantee of payment of the rent by defendant. Subsequently, at plaintiff's request, defendant took out in his own name a lease of the premises for the further term of four years upon an agreement to assign it to them in consideration of their purchase from him of an automatic electric piano. The purchase price was \$750, upon which a payment of \$100 was to be made. The cash payment subsequently was waived, and notes for the full amount of the purchase money given. After the purchase plaintiffs incurred an additional indebtedness to defendant of about \$400. This amount, together with the notes, some of which were overdue, was outstanding when the plaintiffs asked for an assignment of the lease. This the defendant demurred to giving, desiring to retain the lease as security. The plaintiffs then, but against the defendant's advice, executed a chattel mortgage of their stock-in-trade to him, whereupon he made over the lease to them. Held, that the chattel mortgage should not be set aside on the ground of having been obtained by coercion. While the rule, that in absence of agreement the purchaser of a specific chattel cannot return it on a breach of warranty, may not apply to a sale providing that the property shall not pass until payment of the purchase price, it will apply in such case where the vendee, in addition to keeping the chattel a longer time than reasonable or necessary for trial, has exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor (c).

On the trial of an action to set aside a bill of sale, as made with intent to hinder and delay creditors, evidence was given to show that the bill of sale in question was given in substitution for a bill of sale executed some two years previously, from which a provision as to after-acquired property was alleged to have been omitted, although it was understood and agreed that such provision should be included. Evidence was given on the other hand to show that the written memorandum of instructions

(b) *Hains v. Leblanc*, 38 L. S. R. 528.

(c) *Petropolis v. F. E. Williams Co.* (No. 2), 3 N. B. Eq. 346.

for the original bill of sale contained no reference to after-acquired property; that neither the solicitor by whom it was drawn nor a witness who was present at the time, and knew of the terms of the negotiations, made any mention of it; and that on an occasion when both defendants in this action gave evidence before a commissioner under the Collection Act touching the affairs of the defendant, by whom the bill of sale was made, no such arrangement was suggested. The trial judge having given judgment for the defendants, and the Court being of the opinion that the precarious character of the evidence given by defendants at the trial had not been sufficiently considered, a new trial was ordered with costs. *Seemle*, as the Collection Act requires the commissioner to file the evidence taken before him such evidence must be taken in writing, and is the best evidence as to what was said during the enquiry (*d*).

The legal estate in the offspring of mares comprised in a chattel mortgage covering them and also "the increase" from them, is in the mortgagee, and title to such offspring cannot be acquired by one who purchases them in good faith for value, although he receives delivery from the mortgagor before the mortgagee attempts to get possession (*e*). Section 20 of the Bills of Sale and Chattel Mortgage Act, R. S. M. (1902), c. 11, is sufficiently complied with by the use of the expression "kept on foot," in the mortgagee's affidavit for removal of a chattel mortgage, instead of the words "kept alive" used in that section, as the two expressions mean the same thing (*f*). (3) The "subsequent purchaser" mentioned in s. 29 of the Act, against whom a chattel mortgage will cease to be valid upon goods removed out of the division where it was registered, unless a certified copy is registered in the division to which the goods have been removed within six months after the removal, must be one who purchased after the expiration of such period of six months (*g*). The affidavit of *bona fides* on a chattel mortgage,

(*d*) *Farlinger v. Thompson*, 37 N. S. R. 513.

(*e*) *Dellaree v. Doyle*, 43 U. C. R. 442, and *Temple v. Nicholson*, Cassell's S. C. D. 114, followed.

(*f*) *Emerson v. Bannerman*, 19 S. C. R. 1, followed.

(*g*) *Hubert v. Peterson*, 36 S. C. R. 324, followed; *Roper v. Scott*, *Wallace v. Scott*, *Gabraith v. Scott*, 5 W. L. R. 314; 16 Man. L. R. 594.

is sufficient, although it purports to be the joint affidavit of two mortgagees, and the jurat does not shew that they were severally sworn. (2) The insertion in the affidavit of a clause reading "that I am the duly authorized agent of the mortgagee" was an apparent mistake, and did not vitiate it, although it was the affidavit of the mortgagees themselves. (3) The fact that it has been stated in the jurat that the affidavit has been "sworn" whereas the defendants affirmed is not a fatal objection, as by the Interpretation Act the expressions "swear" and "sworn" respectively include "affirm solemnly" and "affirmed solemnly." (4) The Bills of Sale and Chattel Mortgage Act (*h*) does not require that the occupation of the mortgagee should be stated in the affidavit of *bona fides* (*i*). (1) Under a lease for a year dated April 6, reserving as rent one-third of the crops, and providing that the lessee should thresh the grain and draw it to the elevator or cars to be stored and shipped as might be agreed between the parties in the name of the lessor, but fixing no time when that was to be done, there is no rent due until the end of the year, and a distress by the landlord in November following is illegal. (2) A distress for rent is unlawful if the tenant is not in possession at the time. A chattel mortgage will not be held void under s. 12 of the Bills of Sale and Chattel Mortgage Act, R. S. M. (1902), c. 11, because the affidavit of *bona fides* made by an agent stated that he had "a knowledge of all the facts connected with the said mortgage" instead of saying in the words of the section, that he was "aware of all the circumstances" (*k*). (4) It is no objection to a mortgage on growing crops to secure the price of seed grain supplied, that the grain had not been sold to the mortgagor by the mortgagee himself, but was purchased by him for the mortgagor from a third party (*l*). (5) Under s. 39 of the Act it is a fatal objection to a mortgage on growing crops or crops to be grown, if it is

(*h*) R. S. M. (1902), c. 11, s. 5.

(*i*) *Brodie v. Ruttan*, 16 U. C. R. 207, followed; *Dyck v. Graening*, 6 W. L. R. 171; 17 Man. L. R. 158.

(*k*) *Emerson v. Bannerman*, 19 S. C. R. 1, and *Rogers v. Carroll*, 30 O. R. 328, followed.

(*l*) *Kirchoffer v. Clement*, 11 Man. L. R. 460, followed.

taken for anything beyond the price of the seed grain furnished and interest thereon (*m*).

In computing the year within which the renewal of a chattel mortgage must be filed under s. 18 of the Bills of Sale and Chattel Mortgage Act (*n*) the day on which the mortgage was filed is to be excluded. Judgment of MacMahon, J., 10 O. W. R., 264, affirmed (*o*). The property covered by a chattel mortgage was described as "all cattle and horses of whatever age and sex branded $\bar{5}$ on the left side and all increase thereof, together with the said brand and branding irons." The defendant, the mortgagee, had owned a number of cattle, some of which were branded "M.S." and others \square and others " $\bar{5}$ " with one or both of the other brands. All those branded " $\bar{5}$ " were sold to the mortgagor. Held, that the description was sufficient for identification, and that no mention of the locality where the cattle were at the time the mortgage was given was unnecessary. By a contemporaneous agreement under seal, the mortgagor agreed for three years to give his whole time and attention to looking after the horses and cattle, the mortgagee agreeing to allow the mortgagor to sell sufficient to pay running expenses. Held, that the agreement did not affect the correctness of the statement of consideration, which was stated as \$3000, the purchase price of the cattle (*p*).

In an action for conversion, the plaintiff claimed title under a registered bill of sale which the jury found was made without consideration, and in fraud of creditors; the defendant justified the taking under an unregistered lien note given subsequent to the bill of sale. Held, that the verdict was properly entered for the defendant (*q*). The plaintiff bought a stock of goods *en bloc*, and the defendants attacked the sale, on the ground that it was a part of a scheme between plaintiff and his vendor to defraud certain wholesale houses. A jury found that the

(*m*) *Meighen v. Armstrong*, 16 Man. L. R. 5.

(*n*) R. S. O. (1897), c. 148.

(*o*) *McCann Milling Co. v. Martin*, 10 O. W. R. 681; 15 O. L. R. 193. Leave to appeal refused, 10 O. W. R. 1053; R. S. O. (1897), c. 75, s. 15; *Gormley v. Brophy Cains, Ltd.*, 10 O. W. R. 913.

(*p*) *Graveley v. Springer*, 3 Terr. L. R. 120; *Newlands v. Higgins* (Alta), 7 W. L. R. 59.

(*q*) *Poitras v. Pelletier*, 2 E. L. R. 463; 38 N. B. R. 63.

transaction was *bonâ fide*, but, on motion for judgment, the defendants questioned the validity of the bill of sale to the plaintiff, on a number of grounds, one of the plaintiff's replies to which was that the Bills of Sale Act did not apply, as this was a transfer of goods in the ordinary course of business, excluded from the operation of the Act by s. 2 (*r*). Held, that the words "transfer of goods in the ordinary course of business," were wide enough to include the sale of a stock-in-trade *en bloc* (*s*).

A company domiciled in Toronto, Ontario, took a bill of sale on goods in Grand Yorks, British Columbia. It was not possible to send the instrument to Toronto and have it returned for filing with the registrar with the affidavit of *bona fides* within the five days required by s. 1, ss. 2 of the Bills of Sale Act, 1905. Held, that an order granting an extension of time for filing the instrument there should be a provision protecting intervening rights (*t*).

Under s. 10 of the Bills of Sale and Chattel Mortgage Act, as enacted by 3 Edw. 7, c. 7, s. 30, the affidavit of *bona fides*, and the affidavit required upon the renewal of a chattel mortgage, where the mortgagees are an incorporated company, if made by the president, vice-president, manager, assistant manager, secretary, or treasurer of the company, need not state that the deponent is authorized by resolution of the directors in that behalf, nor (Riddell, J., dissenting) that he is aware of the circumstances connected with the mortgage and has personal knowledge of the facts deposed to; the words "officer or agent" in the section, according to its proper construction, being confined in their application to an officer or agent who is not one of the principal officers above enumerated (*u*). *Per* Mabee and Riddell, JJ., that the statute does not make it imperative that the position of the deponent should be sworn

(*r*) R. S. B. C. (1897), c. 32, B. C. Stat., 1905, c. 8, s. 3.

(*s*) *Greenburg v. Leny*, 12 B. C. R. 395.

(*t*) *Re Ellis* (W.P.) & Co., 7 W. L. R. 371; 13 B. C. R. 271; *Bloomstein v. J. D. McArthur & Co.* (Man.), 8 W. L. R. 753; *Saskatchewan Lumber Co. v. Michaud* (Sask.), 8 W. L. R. 946.

(*u*) *Bank of Toronto v. McDougal*, 15 C. P. 475; *Freehold Loan and Savings Co. v. Bank of Commerce*, 44 U. C. R. 284, applied and followed notwithstanding the amendments to the statute.

to. *Semble*, per Britton, J., that a creditor, though suing on behalf of himself and all the creditors of his debtor, the latter not having made an assignment for the benefit of creditors nor having been declared an insolvent, cannot follow the proceeds of goods taken under a conveyance not void for fraud in fact, but simply declared invalid by reason of non-compliance with the Bills of Sale and Chattel Mortgage Act; Riddell, J., contra. Riddell, in coming to the conclusion that the plaintiffs were entitled to succeed in their attack upon the defendant's chattel mortgage, considered various defences concerning the status of the plaintiffs and other matters (*x*).

When a mortgagee seizes chattels under a chattel mortgage he must, if he sells the goods, realize the best price that can be obtained; and if he fails to make use of such means as may be necessary to secure such price, he must account to the mortgagor for the full value of the property (*y*).

The owner of goods having executed a chattel mortgage, which was duly recorded in the proper registration district in the province of Saskatchewan, afterward fraudulently removed them to the province of Alberta, where he sold them to a *bonâ fide* purchaser for value without notice of the mortgage. Held, that such sale conferred no title to the goods as against the chattel mortgage, the mortgage being good as between the parties, and the Bills of Sale Ordinance, which requires a certified copy of the mortgage to be filed in the registration district to which the goods were removed, being inoperative as a law of the province of Saskatchewan, beyond the boundaries of that province. If the mortgage is good according to the law of the *situs* of the goods at the time of execution as between the parties, it is good in every other *situs* to which the goods may be removed, even as against subsequent purchasers and creditors, and if registration is only required by the law of the original *situs* to protect creditors and subsequent purchasers, this means creditors and subsequent purchasers seeking to enforce their claims within the judicial territory of the original *situs*, and,

(*x*) *Universal Skirt Manufacturing Co. v. Gormley*, 17 O. L. R. 114; 11 O. W. R. 1110; *Imperial Brewers, Ltd. v. Gelin*, 9 W. L. R. 99.

(*y*) *Grimes v. Gauthier*, 7 W. L. R. 485; 1 Sask. L. R. 54.

consequently, whether registered in either jurisdiction or not, the mortgage valid between the parties, is valid to all intents and purposes in any foreign (including other provincial) jurisdiction. Semble, that in an action by the mortgagee for the return of the goods and damages for detention, the goods having been returned, the measure of damages is the amount of the interest on the price paid by the defendants for the goods (z).

It is not essential to the validity of a chattel mortgage to secure future advances that such advances should be made to enable the mortgagor to enter into business as well as to carry it on (a). A mortgage, dated the 8th of February, 1907, whereby the time fixed for repayment is the 8th of February, 1909, does not extend the liability beyond two years from that date. Where the affidavit of *bona fides* is made by an officer of an incorporated company, the company is like an individual, bound by the recitals in the mortgage, e.g. a recital of an agreement in writing for future advances. The affidavit of *bona fides*, where the mortgagee is an incorporated company, may be made by the company's vice-president, who need not be described an agent (b).

Where chattels have been mortgaged in one registration district, a purchaser from the mortgagor within three weeks after their removal to another district acquires a good title if the mortgagee omits within the three weeks to refile his mortgage. Scott, J., dissented (c).

The claimant in an interpleader issue claimed under a bill of sale whereby the goods seized were assigned to her for an expressed consideration of \$1000. In support of this consideration she proved a marriage settlement, whereby the defendant in the main action, her husband, in consideration of marriage, settled on her the sum of \$3000, and charged this sum on his property, and she alleged that the bill of sale was given in

(z) *Jones v. Twohey*, 8 W. L. R. 295; 1 Alta L. R. 267; *Gormley v. Brophy Cains, Ltd.*, 11 O. W. R. 727; *Morin v. Valios*, 12 O. W. R. 923.

(a) *Goulding v. Deeming*, 15 O. R. 201, followed.

(b) *Newlands v. Higgins, re Great West Saddlery Co.*, 7 W. L. R. 59; 1 Alta. L. R. 18; *Robinson v. Wilson*, 12 O. W. R. 198, 763.

(c) *Peterson v. Hulbert*, 6 Terr. L. R. 114. Reversed in *Hulbert v. Peterson*, 36 S. C. R. 324.

pursuance of this settlement, which settlement was properly made and executed in accordance with the laws of the province of Quebec. Held, that under s. 11 of the Bills of Sale Ordinance (c. 43, C. O., 1898) the bill of sale was void as against creditors, inasmuch as the consideration therein was not truly expressed (*d*).

Interpleader Issue.

The sheriff had seized defendant's interest in 500 bushels of grain, defendant as landlord receiving half of the crop. The claimants held an assignment of the lease as security. The claimants were barred, there being no change of possession and the lease not having been registered (*e*).

In an action to set aside a chattel mortgage as fraudulent and void and have an account taken of defendant's dealings in connection with the purchase of a restaurant. Held, upon the evidence, that the chattel mortgage for \$630 should be reduced to \$502.55 (*f*).

The plaintiffs in May, 1907, in pursuance of a previous agreement, purchased the business plant and stock-in-trade of L. Bros., subject to their debts and liabilities. One of these was a loan of \$4000 from the defendants, secured by a chattel mortgage of all the plant and stock-in-trade of L. Bros. This chattel mortgage contained a provision that it should cover all after-acquired goods and chattels brought upon the premises owned or occupied by the plaintiffs, or used in connection with their business during the currency of the mortgage. The plaintiffs had been incorporated as a company prior to the date of the chattel mortgage, and L. Bros. were the principal promoters and became the president and vice-president respectively, being, in fact, the controlling shareholders. \$2104.64 of the money lent to the defendants to L. Bros. was handed over to the plaintiffs and by them applied towards payment of

(*d*) *Saskatchewan Lumber Co. v. Michaud*, 1 Sask. L. R. 412; 8 W. L. R. 946.

(*e*) *Robinson v. Lott*, 9 W. L. R. 684.

(*f*) *Vlahas v. Poppas* (1909), 14 O. W. R. 465.

the debts by L. Bros. The plaintiffs paid an instalment of the interest due to the defendants on the \$4000 loan. Held, (1) that the provision in the chattel mortgage as after-acquired goods was as binding upon the plaintiffs as purchasers of the mortgaged property with notice of it, as it would be upon the executors or administrators of the mortgagors, and that the defendants had a good valid lien and charge upon all after-acquired goods brought upon the premises in question by the plaintiffs (*g*). (2) That the plaintiffs were, in the circumstances, estopped from disputing such lien and charge (*h*). And the defendants were entitled to show in evidence the facts constituting such estoppel although it had not been pleaded, as an estoppel in *pais* need not be pleaded to make it obligatory. (3) That the mortgage was not void as to the after-acquired goods because of the generality and vagueness of the description (*i*). An execution creditor who permits more than one year to pass after the production by his opponent of a bill of sale under which the latter claims to be the owner of the goods seized, is no longer entitled to contest the title of his opponent by declaring the invalidity of the bill of sale as made in fraud of creditors. A bill of sale in which the price mentioned is fictitious has the same force as a gift (*k*).

A creditor who, holding collateral security, refuses to accept the amount due him, duly tendered by the debtor, and proceeds to collect or realize the security, is liable for the damage thereby caused the debtor (*l*).

Chattel mortgage held valid where executed by president, secretary, and managing director, the company being composed of these three persons. In such a case there was no necessity of a shareholders' meeting and the passing of a formal resolution. Held, that the company had power to mortgage. It is not invalid because affidavits of executors and *bona fides*

(*g*) *Mitchell v. Winslow*, 2 Story 630, followed.

(*h*) *Pickard v. Sears*, 6 A. & E. 469, and *Freeman v. Cooke*, 18 L. J. Ex. 119, followed.

(*i*) *Lazarus v. Andrade*, 5 C. P. D., followed; *Imperial Brewers, Ltd. v. Gelin*, 18 Man. L. R. 283; 9 W. L. R. 99.

(*k*) *Ross v. Lefebvre* (1909), Q. R. 38 S. C. 210.

(*l*) *Desgroseillers v. Anderson* (1909), Q. R. 36 S. C. 234.

sworn before solicitor for parties to the mortgage. Held, further, the mortgage valid as to one creditor and invalid as to the other, the former having used pressure and agreed to make future advances (*m*).

Action for an account of proceeds of sale of horses under a chattel mortgage and for damages for negligence in exercising power of sale, etc. Account directed to be taken, and proper costs of sale and distress to be ascertained. Held, that there was negligence in the bringing of the horses to the place of sale, and defendants liable for death of some horses (*n*).

Action to set aside Chattel Mortgage and for an Account.

Defendant having seized under his chattel mortgage, sold two days after seizure. The speed was caused by the fact that rent would be due on the day following sale. Held, that the mortgagee standing in a fiduciary character must take all reasonable means to prevent a sacrifice. There should have been at least five days' notice of sale. Defendant offered to take proceeds of sale in full. If not accepted reference directed (*o*). The owner, who revendicates personal property (in this case two teams of horses), left in possession of the defendant, and who accepts in settlement of the suit, the costs and a sum of money, as the value of the property, which thus passes to the defendant, does not thereby waive his right to the value of the use of the property, during the period from the institution of the suit to the settlement, and has an action against the defendant to recover the same (*p*).

Time for redemption of goods covered by chattel mortgage extended for three months, on condition that the mortgagors pay the cost of this motion—\$25 : \$1000 on the 4th of December, prox., and \$1000 on the 4th of January, 1910. If necessary, a

(*m*) *Barthels, Shewan and Co., Ltd. v. Winnipeg Cigar Co. (Alta)*, 10 W. L. R. 263.

(*n*) *M'Hugh v. Union Bank*, 11 W. L. R. 667.

(*o*) *Wood v. Dettlor* (1909), 14 O. W. R. 192.

(*p*) *Maloney v. O'Brien* (1909), Q. R. 36 S. C. 62.

new account can be taken and the exact amount ascertained, allowing for storage, charges, insurance, etc. (*q*).

A renewal statement filed by a chattel mortgagee was not signed, but on the back was an affidavit, signed and sworn by the mortgagee referring to the statement. Held, a sufficient compliance with R. S. O. (1897), c. 148, s. 18 (*r*). The statement of payments made did not set forth in detail the date and amount of each payment but only the total sum paid. It went on to state "that no payments have been made upon the said mortgage," but it clearly showed that payment of a certain sum had been made on account of interest and no other payments. Held, that the statute had been sufficiently complied with (*s*).

In computing the year within which the renewal of a chattel mortgage must be filed under s. 18 of the Bills of Sale and Chattel Mortgage Act (*t*) the day on which the mortgage was filed is to be excluded (*u*).

A chattel mortgage provided for the payment of \$125, the principal money in consecutive monthly instalments of \$5 each, and for payment of \$5 more with each instalment for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897. Held, that this being an Act passed on grounds of public policy for the benefit of borrowers its application could not be waived, and that the mortgagee was entitled to interest only at the legal rate (*x*).

Successive renewal statements of a chattel mortgage need not show all the audits on account of the mortgage; it is sufficient if such statement contains the payments made since the last renewal (*y*).

(*q*) *Mitchell v. Kowalsky* (1909), 14 O. W. R. 792; 1 O. W. N. 95.

(*r*) *Barber v. Maughan* (1877), 42 U. C. R., followed.

(*s*) *Christin v. Christin* (1899), 1 O. L. R. 634.

(*t*) R. S. O. (1897), c. 148.

(*u*) *M'Cann v. Martin* (1907), 15 O. L. R. 193.

(*x*) *Dunn v. Malone* (1903), 6 O. L. R. 481.

(*y*) *Perr v. Roberts* (1897), 33 C. L. J. 695, over-ruled; *Rogers v. Marshall*, Crawford claimant (1904), 7 O. L. R. 295.

It is only the owner of the goods who can give security under s. 88 of the Bank Act R. S. C., 1906, c. 29, and a bank which has taken such security on goods from the owner, cannot, under that section substitute other goods afterwards coming into the possession of the giver of the security as agent for sale (*z*).

When a transaction is, as it was in this case, in fact, a security for an existing debt, the parties cannot evade compliance with sections 2 and 3 of the Bills of Sale and Chattel Mortgage Act (*a*) relating to such a transaction, namely, by adopting the form of an absolute sale. If, however, the real transaction is a sale with a right of repurchase upon certain terms, the vendor can only be required to observe the requirements of section 6 of that Act (*b*).

A mortgage on lands was given as additional security for the amount secured by a chattel mortgage. On default in payment a warrant was issued under the chattel mortgage, and the goods were seized and taken out of the mortgagor's possession. Although a form of sale was gone through, no sale actually took place, but the goods were taken possession of by the mortgagee and appropriated to his own use. More than ten years after, the mortgagor's possession of the land not having been in any way interfered with, an assignee or mortgagee attempted to exercise power of sale under the mortgage of the lands. Held, that the intended sale was a "proceeding" under s. 23 of R. S. O. (1897), c. 133, which the assignee of the mortgagee was precluded from taking under that section after ten years. Held, also, that the mortgagee of the chattels, having appropriated them to his own use, and being unable to restore them in proper plight and condition, could not enforce payment of the mortgage debt (*c*).

Under s. 10 of the Bills of Sale and Chattel Mortgage Act as enacted by 3 Edw. VII. c. 7, s. 30 (O), the affidavit of *bona fides*, and the affidavit required upon the renewal of a chattel mortgage, when the mortgagees are an incorporated

(*z*) *Barry v. Bank of Ottawa* (1908), 17 O. L. R. 83.

(*a*) R. S. O. (1897), c. 148.

(*b*) *Hope v. Parrott* (1904), 7 O. L. R. 496.

(*c*) *McDonald v. Grundy* (1904), 8 O. L. R. 113.

company, if made by the president, vice-president, manager, assistant manager, secretary or treasurer of the company, need not state that the deponent is authorized by resolution or direction in that behalf, nor that he is aware of the circumstances connected with the mortgage, and has personal knowledge of the fact deposed to ; the words " officer or agent " in the section being confined to one who is not one of the principal officers enumerated (*d*).

When an agreement to give a chattel mortgage is duly made and registered under R. S. O. (1897), c. 148, s. 11, and subsequently a mortgage is made and registered, the giving of such mortgage whereby the legal title becomes vested in the mortgagee does not revest in the mortgagor the equitable title which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee is enabled to rely on it when the mortgage is ineffectual for any reason (*e*).

While the endorsing by a person, not a party to a note, with his name upon it before it has been endorsed by the payee, is not an indorsement in the legal sense so as to make that person legally liable to the payee, a chattel mortgage to the intending purchaser to secure him against the liability intended to be incurred cannot be set aside by the mortgagor's assignee for creditors after the mortgagee has paid the note in question (*f*).

(*d*) *Universal Skirt Manufacturing Co. v. Gormley, et al* (1907), 17 O. L. R. 114.

(*e*) *Fisher v. Bradshaw* (1902), 4 O. L. R. 162.

(*f*) *Robinson v. Mann* (1901), 2 O. L. R. 63.

CHAPTER IV.

Of Mortgages of Ships.

	PARAGRAPH	Paragraphs
<i>Ships not subject to the ordinary law of chattels</i>	133	133—134
<i>Summary of Merchant Shipping Act as to transfers and mortgages of ships</i>	134	
<i>Registration of transfers and mortgages</i>	135	
<i>Transfers of registered mortgages</i>	136	
<i>Transmission of registered mortgages</i>	137	
<i>Certificates enabling sales and mortgages abroad</i>	138	
<i>Ship built in England for delivery abroad is not a British ship within the Act</i>	139	
<i>Equitable mortgages of ships</i>	140	
<i>Doctrine of constructive notice inapplicable to registered mortgages of ships</i>	141	
<i>Mortgages of equitable interests in ships cannot be registered</i>	142	
<i>Mortgagee not entitled to certificate of registry of ship</i>	143	
<i>Guardians, committees, etc., cannot mortgage ship to pay for repairs</i>	144	
<i>Merchant Shipping Act does not affect title to insurance moneys or freight</i>	145	
<i>Mortgage of ship passes furniture, etc., but not cargo or freight</i>	146	
<i>No reassignment required on discharge of registered mortgage of ship</i>	147	
<i>Admiralty division has jurisdiction over mortgages of ships</i>	148	

133. British ships do not pass like ordinary chattels by delivery, and the title to them is not proved by possession (*d*). They are not affected by the Bills of Sale Act (**86**), but have been long subject to special statutory regulations. Ships not subject to ordinary law of chattels.

134. The Merchant Shipping Act, 1894, by which the Acts relating to merchant shipping are amended and consolidated, provides (*e*) Summary of Merchant Shipping Act as to transfers and mortgages of ships. (1) that every British ship, with the exceptions stated, must be registered; (2) that a registered ship or share of a ship, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; (3) that every such bill of sale shall be produced for registration; (4) that the name of the transferee as owner shall be entered in the register; and (5) that a registered ship, or any share therein, may be made a security for a loan or other valuable consideration; and (6) requires that the instrument creating the security (called a mortgage) shall be in the form mentioned in the schedule, or as near thereto as circumstances will permit. This provision, however, is merely directory, and relates only to the instrument creating the legal charge. Consequently, a mortgage

(*d*) There is no market overt for ships. *Per* TURNER, L.J., *Hooper v. Gumm*, L. R. 2 Ch. at p. 290.

(*e*) 57 & 58 Vict. c. 60, ss. 2, 3, 9, 24, 25, 26, 31.

Paragraphs
134—138

Registration
of transfers
and mort-
gages.

Transfers of
registered
mortgages.

Transmission
of registered
mortgages.

Certificates
enabling sales
of registered
mortgages
abroad.

is not invalid by reason of the detailed stipulations of the mortgage being contained in a separate instrument, and not appearing in the mortgage itself (*f*).

135. On the production of such instrument, the registrar of the port at which the ship is registered is to record the same in the register book (*g*), in the order of time in which it is produced to him for that purpose, and is, by a memorandum under his hand, to notify on the mortgage that the same has been recorded, stating the date and hour of the record. The court has inherent power to expunge from the register any entry void for fraud or other reason (*h*), and therefore can expunge the registration of a void mortgage.

136. A registered mortgage of a ship may be transferred in accordance with a statutory form, which is to be registered and endorsed in manner similar to that prescribed in relation to instruments of mortgage (*i*).

137. The transmission (*k*), in consequence of death, bankruptcy or insolvency, or by any lawful means, other than by a transfer of the interest under the Act, of a mortgagee, is to be authenticated declaration, and evidenced according to the Act; upon receipt and production of which declaration and evidence, the registrar is to enter the names of the persons entitled in the register book as mortgagees of the ship, or share, in respect of which the transmission has taken place (*l*).

138. Where a registered owner is desirous of mortgaging at any place out of the country or possession in which the port of registry is situate, the registrar may grant a certificate (*m*), enabling him to do so. Before this can be granted, however, the applicant must state to the registrar, who must enter in the register book the following facts, viz. :—(*n*) (1) the names of the persons by whom the power is to be exercised; (2) the maximum amount of charge to be created; (3) the time within which the power may be exercised; and (4) the place (if any be limited) where it is to be exercised, or a declaration that it may be exercised anywhere within the prescribed limits. No such power can, however, be exercised within the United Kingdom, nor in any British possession in which the port of registry may be situate, nor (if the port of registry is established by Order in Council under this Act) at that port, nor within such adjoining area as is specified in the Order, nor by any person not named in the certificate (*o*).

(*f*) *The Benwell Tower*, 8 Asp. M. C. 13.

(*g*) A slight difference between the mortgage and the register, in the name of the ship, is of no consequence if there is no doubt as to identity; as where the mortgage was of the *City of Bruxelles* registered as the *City of Brussels* (*Bell v. Bank of London*, 3 H. & N. 730).

(*h*) *Brond v. Broomhall*, [1906] 1 K. B. 571.

(*i*) Section 37.

(*k*) Sections 38, 61.

(*l*) Sections 38 (2), 61.

(*m*) Section 39.

(*n*) Section 40.

(*o*) Sections 41, 88. Shanghai was constituted a port of registry by Order in Council of August 6th, 1874; *London Gazette*, August 11th, 1874, May 29th, 1888.

The certificate is to be in the form mentioned in the Act, and is to contain a statement of the particulars directed to be entered in the register book, and an enumeration of any registered mortgages, or certificates of mortgage or sale, affecting the ships or shares in respect of which the certificate is given (*p*). The power must be exercised conformably with the directions contained in the certificate, and a record of every mortgage made thereunder is to be registered by the endorsement of a record thereof on the certificate by a registrar or British consular officer; and no mortgage *bonâ fide* made thereunder can be impeached by reason of the death, before the making of the mortgage, of the person by whom the power was given (*q*). The certificate of mortgage may be cancelled by the registrar by whom it was granted, upon delivery to him, and shall then become void; but before cancelling, he is to record in the register book, (so as to preserve its priority,) any unsatisfied mortgage which may be registered on the certificate (*r*), and also the fact of the cancellation.

Paragraphs
138—139

Upon proof of the loss, destruction, or obliteration of a certificate, and of what, if anything, has been done thereunder, or that nothing has been done, the registrar may issue a new certificate, or direct such entries to be made, or other matter or thing to be done, as might have been made or done if there had been no loss, destruction, or obliteration (*s*). And where the certificate specifies the place where the power is to be exercised, the registered owner may, by an instrument in the form mentioned in the statute, authorize the registrar who granted the certificate to give notice to the registrar or consular officer at such place that the certificate is revoked; and after such notice shall have been recorded by such registrar or consular officer, the certificate, as to any future mortgage to be made at such place, is deemed to be revoked and of none effect, and every registrar or consular officer recording any such notice shall thereupon state to the registrar who granted the certificate, whether any previous exercise of the power to which the certificate refers has taken place (*t*).

139. A ship built in England, under contract for delivery to a foreign company at a foreign port, is not a British ship within the statute, and the interest of the builders may, therefore, be assigned by an instrument which is neither in the form nor registered as prescribed by the statute (*u*). And an agreement to transfer a ship need not be registered, and may be enforced by the registered owner (*x*).

Ship built in
England for
foreign
subject is not
a British
ship.

(*p*) Section 42.

(*r*) Section 43 (8).

(*q*) Section 43 (2), (3).

(*s*) Section 45.

(*t*) Section 46.

(*u*) *Union Bank of London v. Lenanton*, 3 C. P. D. 243

(*x*) *Batthyany v. Bouch*, 4 Asp. M. C. 380.

Paragraphs
140—141

Equitable
mortgages of
ships.

140. The object of the provisions contained in the Merchant Shipping Act, 1894, in relation to transfers and mortgages of ships is merely to provide for *legal* as distinguished from *equitable* ownership. Consequently, although no notice of any such case be entered on the register book (y) yet it is expressly declared that, without prejudice to its provisions for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the Act on registered owners and mortgagees, and without prejudice to the provisions relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests, may be enforced by or against owners and mortgagees of ships in respect of their interest therein, in the same manner as in respect of any other personal property. The Act, therefore, clearly provides for the existence of equitable interests in ships; and a transfer which has been registered as absolute, may be shown (z) to have been only meant as a security, and may be so treated. On similar grounds, the court will enforce equities between the owner and the mortgagee, and in estimating the right of the mortgagee will consider not only the registered documents, but all the transactions between the parties relative to the mortgage loan (a).

A deposit of a registered mortgage of a ship will also create a valid security by way of equitable mortgage (b); and an equitable mortgage may also be created by depositing the builder's certificate of an unfinished ship (c).

Doctrine of
constructive
notice does
not apply to
registered
mortgages of
ships.

141. However, this recognition of equitable mortgages does not give mere equitable mortgages priority or equality, or introduce the equitable doctrines as to constructive notice into such transactions. Thus, it has been held that a legal mortgagee of a ship does not lose priority, even although he knew when he made his advance, of an issue of debentures charging some of the mortgagor's ships, *unless he knew* that such debentures charged the ships mortgaged to him (d). And generally, (subject to any rights and powers appearing

(y) Section 56.

(z) *Ward v. Beck*, 13 C. B. (N.S.) 668; 9 Jur. (N.S.) 912; *The Innisfallen*, L. R., 1 Ad. & E. 72; and see *Hutchinson v. Wright*, 25 Beav. 444. And as to the rights of a purchaser whose bill of sale could not be registered because of his infancy, see *Stapleton v. Haymen*, 10 Jur. (N.S.) 497. It appears to have been intimated that, if an agreement for the purpose was clearly and completely proved, the court might recognize the creditor in the double character of a mortgagee for the purposes of the debt, and of an absolute owner, for the purpose of giving him control over the movements of the ship (*The Innisfallen*, *supra*); but it is conceived that the result would be only to make him mortgagee in possession, and that he could not escape from the liabilities incident to that position.

(a) *The Cathcart*, L. R., 1 Ad. & E. 314.

(b) *Lacon v. Liffen*, 4 Giff. 75; 9 Jur. (N.S.) 13.

(c) *Exp. Hodgkin, re Softley*, L. R., 20 Eq. 746.

(d) *Black v. Williams*, [1895] 1 Ch. 408. See *Barclay and Co., Ltd. v. Poole*, [1907] 2 Ch. 284.

by the register book to be vested in any other person,) the registered owner of any ship, or share therein, has power absolutely to dispose of such ship or share, in the manner mentioned in the Act, and to give effectual receipts for the consideration money (*e*). It is, however, apprehended, that this would not confer a good title on a purchaser who had express notice of any countervailing equity.

Paragraphs
141—144

It has been held, that the assignees in bankruptcy of the owner of a ship, where a mortgage made before the completion of the ship was registered after the ship was completed and registered, could not claim it as against the mortgagee, on the ground that no mortgage having been executed after the registration of the ship, the owner's title remained absolute (*f*).

142. A mortgage of an unregistered and merely *equitable* interest in a ship cannot itself be registered (*g*).

Mortgages of unregistered equitable interests in ships cannot be registered.

143. The Act of 1894 provides (*h*), that the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest, which any owner, mortgagee, or other person may have or claim in the ship; and the refusal to deliver it on demand to the person entitled to it for the purpose of navigation, officer of customs, or other person legally entitled to require it, is punishable by penalty.

Mortgagee not entitled to obtain certificate of registry of ship.

It is, therefore, illegal to pledge the certificate; and the person entitled to it for the purpose of navigation, though himself the pledgor, may maintain an action (*i*) after demand for its delivery, and may recover damages for the wrongful detainer, in addition to his right to proceed for the penalty.

144. The provision of the Act of 1894 (*k*), that if any person interested in any ship or any share therein is by reason of infancy, lunacy, or other disability incapable of making any declaration, or doing anything required by the Act in respect of registry, the guardian or committee of such person, or if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested, may make the declaration or do the thing in the name and on the behalf of the incapable person, does not enable the guardian of an infant shipowner to mortgage the ship for repairs, although it may be that, in the exercise of his necessary power to repair, a lien may be created upon the ship (*l*) (**568, 628**).

Guardians, committees, etc., cannot mortgage ship for repairs.

(*e*) Section 56; and see *Barclay and Co., Ltd. v. Poole, supra*.

(*f*) *Bell v. Bank of London*, 3 H. & N. 730; and see also *The Celtic King*, [1904] P. 175.

(*g*) *Chasteauneuf v. Capeyron*, 7 App. Cas. 127.

(*h*) Section 15.

(*i*) *Wiley v. Crawford*, 7 Jur. (N.S.) 943; 1 B. & S. 253, 265.

(*k*) Section 55.

(*l*) *Michael v. Fripp*, L. R. 7 Eq. 95.

Paragraphs
145—148

Merchant
Shipping Act
does not
affect title to
insurance
moneys or
freight.

Mortgage of
ship passes
all furniture,
etc., but not
cargo or
freight.

No re-
assignment
required on
discharge of
a registered
mortgage.

Admiralty
Division has
jurisdiction
over
mortgages or
ships.

145. The right of an insurer of ships, who is (but does not appear on the register as) the mortgagee, to the proceeds of the policies, is not affected by the Acts (*m*). Nor, although the right to the freight is incidental to the ownership and can be originally dealt with only by the owner of the vessel (*n*), is it necessary to comply with the Acts in order to make a valid assignment of the present or future (*o*) freight of the ship; provided the object be carried out, not necessarily by a distinct instrument, but by a distinct contract, leaving the title to the freight in nowise dependent on the title to the ship (*p*).

146. All articles necessary to the navigation of the ship, or to the prosecution of the adventure, pass to the mortgagee under the word "ship," including articles afterwards substituted for them (*q*). But on the other hand, where the cargo belongs to the owner of the ship, it will not, in the absence of any special agreement, pass to the mortgagee (*r*). And though the cargo of a whale ship, unlike an ordinary cargo, constitutes (and does not merely produce) the earnings of the ship, it is not incident to the employment of the ship as freight, and therefore will not pass by the mortgage under the word "appurtenances," but must be expressly described or mentioned in it (*s*). As to the right of the mortgagee of a ship *who has taken possession* to receive unpaid freight and passage money, see *infra* (924); and as to his right to take possession where the ship is being worked so as materially to imperil the security, see *infra* (924) (*t*).

147. Where a registered mortgage is discharged, a mere entry to that effect in the register book revests the ship in the person in whom (having regard to intervening acts and circumstances, if any) it would have vested if the mortgage had not been made, without the necessity of re-assignment (*u*).

148. The Admiralty Division of the High Court of Justice has jurisdiction over any claims in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1894, whether the ships, or the proceeds thereof, be under the arrest of the court or not; and will enforce equities and correct mistakes in transactions between owners and mortgagees of ships (*x*).

(*m*) *Ladbroke v. Lee*, 4 De G. & Sm. 106.

(*n*) *Morrison v. Parsons*, 2 Taunt. 407; *Lindsay v. Gibbs*, 2 Jur. (N.S.) 1039; 22 Beav. 522.

(*o*) *Douglas v. Russell*, 4 Sim. 524; 1 Myl. & K. 488; *Re Ship Warre*, 8 Price, 269.

(*p*) *Mestaer v. Gillespie*, 11 Ves. 621; *Langton v. Horton*, 1 Hare, 549; *Gibson v. Ingo*, 6 Hare, 112; *Davenport v. Whitmore*, 2 Myl. & Cr. 177.

(*q*) *Coltman v. Chamberlain*, 25 Q. B. D. 328.

(*r*) *Alexander v. Simms*, 18 Beav. 80 aff. 5 De G. M. & G. 57. *Brancker v. Molyneux*, 3 Scott, N. R. 332.

(*s*) *Langton v. Horton*, 5 Beav. 9.

(*t*) *The Manor*, 1907, P. 339.

(*u*) Section 32.

(*x*) Admiralty Court Jurisdiction Act, 1861, 24 Vict. c. 10, s. 11. *The Cathcart*, L. R., 1 Ad. & E. 314; *The Rose*, L. R. 4 Ad. & E. 6.

CHAPTER V.

Of Mortgages of Choses in Action.

	PARAGRAPH	Paragraph
<i>Choses in action not originally assignable at law with a few exceptions</i>	149	149
<i>Gradual extension of exceptions</i>	150	
<i>Since Judicature Act, freely assignable at law unless given by way of charge only</i>	151	
<i>What is an assignment by way of charge only</i>	152	
<i>Choses in action assignable subject to prior equities</i>	153	
<i>Mortgagee of a trustee's beneficial interest is subject to his future indebtedness to estate</i>	154	
<i>Mortgages of negotiable instruments take free from equities</i>	155	
<i>Choses in action excluded from Bills of Sale Act and partially from order and disposition clause</i>	156	
<i>Equity of redemption of policies effected in mortgagor's name</i>	157	
<i>Suicide of assured when policy mortgaged</i>	158	
<i>Usual method of mortgaging shares</i>	159	
<i>Invalidity of blank transfer deeds</i>	160	
<i>Mortgage by a partner of his share in the business</i>	161	
<i>Mortgages of book debts</i>	162	
<i>Mortgages of good will and book debts on terms of receiving share of profits, etc.</i>	163	
<i>Necessity of notice in mortgages of choses in action</i>	164	
<i>Stop order in mortgages of funds in court, and notice in lien of distringas in mortgages of stock or shares</i>	165	

149. Policies of assurance, shares, stocks, book and other debts, Choses in reversionary interests in personal estate held in trust, patent rights, action not and other choses in action, legal or equitable, are frequently assignable at mortgaged. law with a few excep- tions.

At common law, choses in action, with the exception of Crown debts, (a) annuities (b) and negotiable instruments (c) (including exchequer bills payable to bearer (d)) were incapable of being assigned (e), and consequently formerly (except where particular classes of choses in action were made assignable by statute) mortgages of even legal choses in action were necessarily purely equitable ; equity regarding an assignment of a chose in action as perfectly

(a) Year Book, 39 Henry VI. 26.

(b) *Maund's case*, 7 Reps. 28 b. ; *Harg. Co. Litt.* 144 b, note 1.

(c) See *Hopkinson v. Forster*, L. R. 19 Eq. at p. 76.

(d) *Wookey v. Pole*, 4 B. & Ald. 1.

(e) *Lampet's case*, 10 Reps. 48a.

Paragraphs
149—153

valid, and as operating as an agreement to permit the assignee to sue for the chose in the name of the assignor (*f*).

Gradual
extension of
exceptions.

150. The policy of the law has, however, changed with the spread of commerce, and from time to time statutes have been passed, making certain classes of choses in action assignable at law as well as in equity. Thus, by the Companies Clauses Act, 1845, and the Companies Act, 1862, shares, stocks, and debenture in public companies are made freely assignable by registered transfers, and the public funds are also transferable by mere entry in the transfer books at the Bank of England (*g*).

So policies of life assurance were made assignable by 30 & 31 Vict. c. 144, by an instrument in the form given in the Act, or to the purport and effect thereof, on written notice of the date and purport of the assignment being given to the insurance company at their principal place of business.

Since
Judicature
Act, 1873,
choses in
action are
freely
assignable.

151. And now, by s. 25, sub-s. (6) of the Judicature Act, 1873, “any absolute assignment by writing under the hand of the assignor (*not purporting to be made by way of charge only*), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been (*h*), effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.”

What is an
assignment
“not by way
of charge
only.”

152. After considerable conflict of authority, it has been decided that a mortgage of a debt or chose in action made in the ordinary form of an assignment with a proviso for redemption (*i*), or in the form of an assignment by way of trust (*k*), is an absolute assignment not purporting to be by way of charge only within the meaning of this enactment.

Choses in
action only
assignable
subject to
prior
equities.

153. There is one peculiarity about mortgages and other assignments of choses in action other than negotiable instruments (*l*), which is preserved by the above section, viz., that the mortgagee

(*f*) *Row v. Dawson*, 1 Ves. Sen. 331; 1 Wh. & T. Lead. Cas. 93; *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374.

(*g*) National Debt Act, 1870, 33 & 34 Vict. c. 71, s. 22.

(*h*) The sub section is retrospective, *Dibb v. Walker*, [1893] 2 Ch. 429.

(*i*) *Tancred v. Delagoa Bay Co.*, 23 Q. B. D. 239, disapproving *National Provincial Bank of England v. Harle*, 6 Q. B. D. 626, and following *Burlinson v. Hall*, 12 Q. B. D. 347. As to the effect of a second assignment, see *Cronk v. McManus*, 8 T. R. 449.

(*k*) *Comfort v. Betts*, [1891] 1 Q. B. 737.

(*l*) See *London Joint Stock Bank v. Simmons*, [1892] A. C. 201.

or assignee takes them subject to all equities, whether he has notice of them or not (*m*). Thus, a mortgagee of shares or debentures takes them subject to all equitable claims of the company, *ex. gr.*, the company's lien on the shares of its members. But this only extends to equities subsisting at the date of the assignment, and the company cannot after notice of the assignment create fresh equities (*n*). Thus, in the important case of the *Bradford Banking Co. v. Briggs & Co.* (*n*) the articles of association of a joint stock company provided that the company should have a first and permanent (probably a misprint for paramount) lien and charge available at law and in equity upon every share, for all debts due from the holder thereof. A shareholder deposited his share certificates with a bank as security for a loan (*i.e.*, created a mortgage of a chose in action), and the bank gave the company notice of the charge thus created. The certificates expressly stated that the shares were held subject to the articles of association. It was, however, held that the company could not, in respect of moneys which became due from the shareholder to the company after notice of the deposit with the bank, claim priority over advances made by the bank. It was also held that notice to a company of a mortgage of shares is not notice of a trust within the meaning of s. 30 of the Companies Act, 1862.

Paragraphs
153—155

But this is limited to equities in existence at date of mortgage.

154. But this limitation does not extend to the case of a trustee who mortgages his beneficial interest in the trust fund, and subsequently commits a breach of trust. In such a case the other beneficiaries have a first and paramount lien on the share of the defaulting trustee, and the mortgagee can only take subject to that lien (*o*); and this rule applies not only to shares taken by a trustee under the instrument creating the trust, but also to derivative interests acquired by him in the trust estate (*p*). It follows that mortgages of a trustee's beneficial interest in trust funds are securities of a very hazardous character.

Mortgagee of a trustee's beneficial interest takes subject to his past or future indebtedness to the estate.

155. The rule as to assignees of choses in action taking subject to all equities, does not apply to that class of choses in action which are called negotiable instruments, and which pass the legal right either by indorsement or delivery. Thus, where a customer's bonds are wrongfully pledged by a broker with his banker, to secure his own private overdraft, if the bonds are "negotiable" the bank gets a valid charge, unless they have notice, express or implied, of the nature of the transaction. But if the bonds are not negotiable instruments the charge is invalid (*q*).

Mortgagees of negotiable instruments take free from equities.

(*m*) *Cavendish v. Geaves*, 24 Beav. 163; *Rolt v. White*, 3 De G. J. & S. 360.
(*n*) *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29, followed in *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A. C. 281.
(*o*) *Doering v. Doering*, 42 Ch. D. 203.
(*p*) *Ib.* and *Jacobs v. Rylands*, L. R. 17 Eq. 341.
(*q*) *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, explaining *Earl of Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333.

Paragraphs
156—160

Mortgages of choses in action excepted from Bills of Sale Act, and partially from order and disposition clause of Bankruptcy Act.

Policies effected in name of mortgagee.

Effect on mortgagee of suicide of assured.

Usual method of mortgaging shares.

Invalidity of blank deeds of transfer.

156. As has been already stated, mortgages of choses in action are expressly excepted from the Bills of Sale Acts (**86**), and except as to debts due to a bankrupt in the course of his business, they are also outside the operation of the order and disposition clause of the Bankruptcy Act (**127**). They are, therefore, to that extent a much safer security than chattels personal.

157. In the case of mortgages of policies of assurance, the policy is not infrequently effected in the name of *the creditor*. In such cases the question sometimes arises as to whom the policy belongs on the discharge of the debt. It would seem that, in the absence of express contract, the policy will in such cases belong to the mortgagor if he pays the premiums, or is with his own knowledge charged with them on account (*r*). In other cases the policy will belong absolutely to the mortgagee (*s*).

158. Where a life policy contains a clause to the effect that it shall be valid notwithstanding the suicide of the assured, a mortgagee whether legal or equitable (*t*), can enforce it against the company in that event (*u*), even where the mortgagee could recover the debt from another source (*x*), and the company has no claim for indemnity or repayment against the estate of the assured (*y*). And this is so, even where the company is itself the mortgagee (*z*).

159. It is not usual to mortgage shares by means of a legal registered transfer of them, as such a transaction would make the mortgagee a shareholder, and give him the rights and impose upon him the liabilities (where they exist) of one. A mortgage of this kind of property is most commonly effected by a deposit of the share certificates with the mortgagee, accompanied by notice of the deposit to the company. This is not a mere pledge but effects a true equitable mortgage entitling the mortgagee to foreclosure (*a*).

160. It was for some time (and possibly still is) customary in mercantile circles to effect a mortgage of shares or stock by a deposit of the certificates, accompanied by a form of transfer executed by the mortgagor, but leaving the name of the mortgagee and the date in blank. It was assumed that the mortgagee, or his assigns, might

(*r*) *Bruce v. Garden*, L. R. 5 Ch. 32; *Morland v. Isaac*, 20 Beav. 389; *Courtenay v. Wright*, 2 Giff. 337; *Freme v. Brade*, 2 De G. & J. 582; *Drysdale v. Pigott*, 8 De. G. M. & G. 546.

(*s*) *Bruce v. Garden*, *supra*; *Humphrey v. Arabin*, Ll. & G. t. Plunkett, 318; *Foster v. Roberts*, 29 Beav. 467; and see *Dalby v. India and London Life Assurance Co.*, 15 C. B. 365.

(*t*) *Dufaur v. Professional Life Assurance Co.*, 25 Beav. 599; *Jones v. Consolidated Investment Assurance Co.*, 26 Beav. 256.

(*u*) *Moore v. Woolsey*, 4 El. & Bl. 242.

(*x*) *Solicitors and General Life Assurance Society v. Lamb*, 2 De G. J. & S. 251.

(*y*) *Ib.*

(*z*) *White v. British Empire Life Mutual Assurance Co.*, L. R. 7 Eq. 394.

(*a*) *Harrold v. Plenty*, [1901] 2 Ch. 314.

at any time fill in the blanks and present the transfer for registration, and that when the registration was effected, the legal, as well as the equitable title, would pass to the transferee. It has, however, been held, that at all events where the statute or other regulations governing the company requires the transfer to be by deed, such blank transfers are ineffectual. In such cases the legal title can only be transferred by (1) a deed of transfer, (2) duly registered (*b*). Registration without the deed is not sufficient (*c*). But a deed materially altered after its execution is not the deed of the person who has executed it, and is therefore void and ineffectual as a legal transfer so as to confer on the transferee a legal title with all its protective incidents (*d*). However, a person who executes a deed of transfer in blank may be estopped from denying its validity as against *bonâ fide* purchasers from the grantee without notice (*e*). And it would seem that a blank transfer would not be ineffectual in the case of shares which are only transferable by "an instrument in writing" (*f*). Such an instrument when filled in, might pass the legal property; for by delivering it to the transferee, the transferor must be presumed to have authorized him to act as his agent for the purpose of completing the transfer (*g*), a consideration inapplicable to the case of a deed, which can only be executed by an agent appointed by instrument under seal (*h*). Even in such cases, however, persons dealing with the party having the custody of a blank transfer, ought apparently to make enquiries, and cannot claim the benefit of being purchasers for value without notice, so as to acquire a greater right than the person from whom they themselves received the instrument (*i*).

Paragraphs
160—161

Whether
blank
transfers
invalid in
cases where
a deed is not
required,
quære.

161. By section 31 of the Partnership Act, 1890 (*k*), it is enacted as follows: " (1) An assignment by any partner of his share in the partnership either absolute or by way of mortgage or redeemable charge does not as against the other partners entitle the assignee

Mortgage by
a partner of
his share in
the business.

(*b*) *Moore v. North Western Bank*, [1891] 2 Ch. 599; *Société Générale de Paris v. Walker*, 11 App. Cas. 20; *Roots v. Williamson*, 38 Ch. D. 485; and see also *Nanney v. Morgan*, 37 Ch. D. 346; *Ireland v. Hart*, [1902] 1 Ch. 522.

(*c*) See *per* LINDLEY, L.J., *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555.

(*d*) *Ib.* and *Société Générale de Paris v. Walker*, 11 App. Cas. 20; *France v. Clark*, 26 Ch. D. 257; *Fox v. Martin*, 64 L. J. Ch. 473. Applied to a mortgage of a ship in *Burgis v. Constantine*, [1908] 2 K. B. 484.

(*e*) *Waterhouse v. Bank of Ireland*, 29 L. R. Ir. 384; *Hone v. Boyle & Co.*, 27 L. R. Ir. 137; *Colonial Bank v. Cady*, 15 App. Cas. at p. 286; and *Earl of Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333.

(*f*) *Ortigosa v. Brown*, 47 L. J. Ch. 168.

(*g*) See *per* Lord HERSCHELL, in *Colonial Bank v. Cady*, 15 App. Cas. at p. 286.

(*h*) See *per* KAY, L.J., *Powell v. London and Provincial Bank*, [1893] 2 Ch. at p. 558.

(*i*) *France v. Clark*, 26 Ch. D. 257, but *cf.* dictum of Lord HERSCHELL in *Colonial Bank v. Cady*, 15 App. Cas. at p. 286, which seems scarcely consistent with this view.

(*k*) 53 & 54 Vict. c. 39.

Paragraphs
161—163

during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs (*l*), or to require any accounts of the partnership transactions or to inspect the partnership books, but entitles the assignee only to receive the share profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. (2) In case of a dissolution of the partnership whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and for the purpose of ascertaining that share to an account as from the date of the dissolution" (*m*). By section 33 of the same Act, however, "a partnership may, at the option of the other partners be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt." Such mortgages therefore, without the consent of the other partners, afford a very unsatisfactory security.

Mortgages of
book debts.

162. Mortgages of debts, and beneficial contracts, are usually made by deed; but a simple writing not under seal is sufficient (*n*). Such mortgages need not be confined to debts actually due or even accruing. A mortgage of all the book debts due and owing, or which may, during the continuance of the security, become due and owing to the mortgagor, has been held to be sufficiently definite, and to pass the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment, or in any other business (*o*). Of course in such cases the provisions of the order and disposition clause of the Bankruptcy Act (**124**) must not be lost sight of.

163. Not infrequently the book debts and good will of a business are mortgaged on the terms of the lender receiving a share of the profits in lieu of interest or of the rate of interest varying with the profits. By s. 2, sub-s. (3) of the Partnership Act, 1890 (53 & 54 Vict. c. 39), it is enacted (*inter alia*) that the receipt of a share of profits, or of interest varying with the profits, by a person who has advanced money to a person engaged in a trade or undertaking, under a contract in writing *signed by or on behalf of all parties*, shall not of itself constitute partnership. But

(*l*) For instance, the mortgagee cannot object to salaries paid by the firm to individual partners for managing departments of the business, although his share of profits may in consequence be greatly reduced, *Re Garwood, Garwood v. Paynter*, [1903] 1 Ch. 236.

(*m*) See *Watts v. Driscoll*, [1901] 1 Ch. 294.

(*n*) *Chowne v. Baylis*, 31 Beav. 351.

(*o*) *Tailby v. Official Receiver*, 13 App. Cas. 523, overruling *Belding v. Read*, 3 H. & C. 955, and *Re D'Epineuil, Tadman v. D'Epineuil*, 20 Ch. D. 758, and approving *Re Clarke, Coombe v. Carter*, 36 Ch. D. 348; *Bloomer v. Union Coal and Iron Co.*, L. R. 16 Eq. 383; *Holroyd v. Marshall*, 10 H. L. C. 191.

although such a transaction does not of itself constitute a partnership, a very little more will do so. As Lord Halsbury said, in *Adam v. Newbigging* (p), “if a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit and loss, no indirect expedient for enforcing control over the adventure, will prevent the substance and reality of the transaction being adjudged a partnership”; and “no phrasing of it by dexterous draftsmen will avail to avert the legal consequences of the contract,” viz., full liability for the debts of the firm. In all such transactions, therefore, there must be a *bonâ fide* loan, one necessary ingredient of which is personal liability on the part of the borrower to repay the loan. An arrangement by which the lender is only to be repaid out of the assets of the business can never be a loan but must be a partnership (q). Again, the lender must not take an interest in or share of the capital of the business in specie; because thereby he becomes jointly interested in capital and profits, or in other words becomes part owner of (*i.e.*, partner in) the business. Nor must his share of the profits vary in the proportion which his loan may from time to time bear to the rest of the capital; for that shows that he is not lending his money on the security of a definite share of the profits, but is really contributing to a joint speculation, in which he and the other speculators are to take profits *pari passu*. A provision for the return by the lender of a proportion of the profits received by him in one year, in case of subsequent losses, would be an almost certain mark of partnership, for no *bonâ fide* lender would submit to such a provision. For the same reason arbitration clauses must be avoided, and clauses giving the lender a right to interfere or take part in the management of the business. Even a covenant by the borrower to employ the loan exclusively in the business is not to be lightly introduced, although in the above form it is conceived to be good (r). It must also be pointed out that s. 3 of the Act enacts, that a lender under s. 2 is not to be entitled to recover anything in respect of his loan or his share of profits *in the event of bankruptcy or insolvency* of the borrower, until all the claims of the other creditors have been satisfied. This provision, however, only relates to the right of *proof* against the assets, and does not affect the lender’s right as a secured creditor if he happened to have other security for his capital, *ex. gr.*, on freehold works or a sinking fund policy,

Paragraph
163

If a partnership exists there is no limit to liability of such partners. Essentials where profits are to be shared without liability for debts.

Effect of debtor’s bankruptcy.

(p) 13 App. Cas. 308, 315.

(q) *Exp. Delhasse, re Megavand*, 7 Ch. D. 511.

(r) See *Badeley v. Consolidated Bank*, 38 Ch. D. 238. The following authorities may also be consulted, viz., *Cox v. Hickman*, 8 H. L. C. 268; *Syers v. Syers*, 1 App. Cas. 174; *Pooley v. Driver*, 5 Ch. D. 458; *Exp. Tennant, re Howard*, 6 Ch. D. 303; *Exp. Delhasse, re Megavand*, 7 Ch. D. 511; and *Davis v. Davis*, [1894] 1 Ch. 393. A precedent of such a mortgage will be found in the 8th Vol. of The Encyclopædia of Forms and Precedents, p. 754.

Paragraphs
163—165

although it would seem to be doubtful whether he would have any available charge on the book debts, which are in fact an ingredient of the profits (s).

Necessity of
notice in
mortgages of
choses in
action.

164. In all mortgages of choses in action it is essential that notice should be given to the company, debtor, trustee, or other person liable to pay or hand over the chose. This is primarily for the purpose of preventing such person from paying or handing over the debt or other chose in action to the mortgagor or his representatives, and secondarily to prevent a subsequent incumbrancer or purchaser without notice of the mortgage from gaining priority over it (t). If, however, in the absence of express notice *from the mortgagee*, it can be proved that the debtor, etc., had notice *aliunde*, that will suffice (u). This question of notice will be treated of at greater length later on, when we come to the consideration of priority among mortgages (1226—1258).

Stop orders
and notices
in lieu of
distringas.

165. Where the chose in action which is the subject of the mortgage consists of a trust fund in court, a stop order should be obtained, and this is equivalent to the notice which ought to have been given to trustees if the fund had been in the hands of trustees (x). Mere notice to the Paymaster-General is not enough (y). Similarly where government stock or the stock or shares or debentures of any public company, whether incorporated or not, are equitably mortgaged, it is proper to give a notice in lieu of the old process of *distringas*, which entitles the mortgagee to eight days' notice from the bank or company of any application to transfer (z), and gives the mortgagee the opportunity of obtaining a restraining order (a) or an injunction (b).

As to the nature of the right of a mortgagee of a trust fund against the trustee, see *infra* (914 and 970).

(s) *Badeley v. Consolidated Bank*, *supra*.

(t) *Spencer v. Clarke*, 9 Ch. D. 137.

(u) *Lloyd v. Banks*, L. R. 3 Ch. 488.

(x) *Greening v. Beckford*, 5 Sim. 195; *Swayne v. Swayne*, 11 Beav. 463.

(y) *Warburton v. Hill*, Kay, 470.

(z) R. S. C., Order 46, rr. 2—11.

(a) Under 5 Vict. c. 5, s. 4.

(b) Under 39 & 40 Geo. 3, c. 36. See Seton on Decrees, 6th Ed. 729, 730, and *re Blakeley's Trusts*, 23 Ch. D. 549. *Re Prynne*, 53 L. T. 465; *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. D. at p. 453.

CHAPTER VI.

Of Mortgage Debentures.

	PARAGRAPH	Paragraph
<i>Meaning of term "debenture"</i>	166	166
<i>Debentures payable to bearer are negotiable instruments</i>	167	
<i>Debentures issued in blank</i>	168	
<i>Meaning of "floating securities"</i>	169	
<i>Effect of floating securities</i>	170	
<i>Effect of floating securities on subsequent executions against the company</i>	171	
<i>Subsequent floating securities do not take priority of prior ones</i>	172	
<i>Use of term "floating security" not essential to the creation of one</i>	173	
<i>Effect of mortgage debentures issued by railway and other companies incorporated for carrying out public works</i>	174	
<i>Uncalled capital may be included in floating security</i>	175	
<i>Remedy of debenture holders when uncalled capital is included</i>	176	
<i>Effect of company mortgaging its unissued debentures</i>	177	
<i>When a majority of debenture holders can control a minority</i>	178	
<i>Remedy by foreclosure applicable to mortgage debentures of ordinary companies</i>	179	
<i>Receiver appointed directly the security is endangered</i>	180	
<i>Effect of a covering trust deed</i>	181	
<i>Debenture stock under Companies Clauses Act</i>	182	
<i>Debenture stock under Mortgage Debenture Acts</i>	183	

166. Incorporated companies, although they may (when authorized expressly or impliedly by the instrument by which they were incorporated as to which, see *infra* **275, 276, 284 et seq**) create ordinary mortgages of their property, or of some part of it, usually borrow on the security of instruments called mortgage debentures. For the purposes of s. 17 of the Bills of Sale Act, 1882 (which excludes the debentures of an incorporated company from the provisions of that Act), it has been held that a single instrument creating a mortgage or security, although not forming part of a contemporaneous series, may be a mortgage debenture (*a*); but, nevertheless, mortgage debentures, according to the commercial and business

(a) *Levy v. Abercorris Slate and Slab Co.*, 37 Ch. D. 260; *Robson v. Smith*, [1895] 2 Ch. 118, and see *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, and *Re Opera Limited*, [1891] 3 Ch. 260.

Paragraphs
166—167

connotation of the term, consist of a series of short contemporaneous instruments, usually, but not necessarily, under the company's seal, containing an undertaking by the company to pay a person named, or the registered holder, or sometimes bearer of the debenture, a sum named, on a day certain, or such earlier day as the debt may become payable under endorsed conditions (*b*) ; and to pay interest in the meantime after a specified rate, and charging such payments on the company's undertaking, and all its property, present and future, including (sometimes) its uncalled capital (*or* sometimes only on the rates and tolls receivable by the company or on some specified property) ; and containing a statement that it is issued subject to certain endorsed conditions. These conditions provide that the debenture is one of a series of (say) 200, each for securing the principal sum of (say) 100*l.*, issued, or about to be issued, by the company, all of which are to rank *pari passu* (*c*) as a first (or, as the case may be, a second or third) charge on the property charged, without any preference or priority one over another ; and (very generally) that such charge is to be a "floating security" (169-173). The conditions also provide in detail for the assignment or transmission of the debenture, sometimes by registered assignment, sometimes by mere delivery ; and also that the money secured shall become payable, if default be made in payment of interest, or if an order is made, or an effective resolution passed, for winding the company up. They generally also provide for meetings of the debenture holders, and for the validity of resolutions passed at such meetings, so as to bind a dissentient minority. The conditions also contain various other provisions, which it is unnecessary to set out in detail here (*d*). The necessity for registration of debentures is treated of, *infra* (284). Contrary to the general law of mortgage Parliament has by section 103 of the Companies Consolidation Act, 1908, enacted that debentures whether issued or executed before or after the passing of that Act shall not be purchased by reason only that they are made irredeemable or redeemable only on the happening of a contingency however remote (*e*).

Debentures payable to bearer are negotiable instruments.

167. Whether debentures payable "to bearer" are negotiable instruments under the law merchant, so as to pass from bearer to bearer at common law, free from all equities, may now (after some

(*b*) But where the undertaking is only to pay on a day certain, without more, payment will nevertheless become due on a winding up before the day named : *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547.

(*c*) As to debentures ranking *pari passu*, see *Re Mersey Rail. Co.* (No. 1), [1895] 2 Ch. 287.

(*d*) For forms of debentures and endorsed conditions, see *Palmer's Company Precedents*, 6th ed.

(*e*) This puts an end to doubts entertained in *Re Southern Brazilian, etc., Rail. Co.*, [1905] 2 Ch. 78.

conflict of authority (*f*) be considered to be settled in the affirmative (*g*). The bearer can consequently sue the company in his own name (*h*).

Paragraphs
167—169

168. Where a debenture (not payable to bearer) is issued to a person with his name left in blank, the debenture, as such, is void, but where the whole series of the debentures (of which it forms one) are further secured by a trust deed, the lender will nevertheless have an equitable security for his loan, and be entitled to participate *pari passu* with the holders of valid debentures in the property covered by the trust deed (*i*).

Debentures
issued in
blank.

169. A floating security (which is the kind of security almost invariably created by mortgage debentures) is an equitable charge upon the assets for the time being of an incorporated company (which has power to charge its assets), but which remains dormant and leaves the company at liberty to deal with them in the ordinary course of its business, as it thinks fit, until stopped, either by the appointment of a receiver, or by a winding up (*k*), or the happening of some agreed event (*l*) when the charge becomes fixed and effective, and gives the chargee priority over the general creditors (*m*). It has been happily said, that floating securities constitute a charge, but give a licence to the company to carry on its business (*n*). So long as the security remains a floating security, or, in other words, the licence to the company to carry on its business has not been terminated, the property of the company may be dealt with and even a

Meaning of
"floating
securities."

(*f*) *Conf. Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374; and *Goodwin v. Roberts*, 1 App. Cas. 476; and *Re Blakely Ordnance Co., Exp. New Zealand Banking Corporation*, L. R. 3 Ch., at p. 159; and *Re Agra and Masterman's Bank, Exp. Asiatic Banking Corporation*, L. R. 2 Ch., at p. 397; *Re Romford Canal Co.*, 24 Ch. D. 85; *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693; and see *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841.

(*g*) *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658, foll. in *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144.

(*h*) *Re Uruguay Central, etc., Rail. Co. of Monte Video*, 11 Ch. D. 372; *Re Blakely Ordnance Co., Exp. New Zealand Banking Corporation*, L. R. 3 Ch. 154; *Re Imperial Land Co. of Marseilles, Exp. Colborne and Strawbridge*, L. R. 11 Eq. 478; *Re Olathe Silver Mining Co.*, 27 Ch. D. 278; *Mowatt v. Castle Steel and Iron Works Co.*, 34 Ch. D. 58.

(*i*) *Re Queensland Land and Coal Co.*, *Davis v. Martin*, [1894] 3 Ch. 181.

(*k*) See *per* COZENS-HARDY, J., *Wallace v. Evershed*, [1899] 1 Ch. 891.

(*l*) See *Re Horne & Hellard*, 29 Ch. D. 736; *Government Stock, etc., Investment Co. v. Manila Rail. Co.*, [1895] 2 Ch. 551; aff. [1897] A. C. 81.

(*m*) See *per* JESSEL, M.R., *Re Colonial Trusts Corporation, Exp. Bradshaw*, 15 Ch. D. 465, 467; *Re Panama, etc., Royal Mail Co.*, L. R. 5 Ch. 318; *Re Florence Land and Public Works Co., Exp. Moor*, 10 Ch. D. 530; *Hodson v. Tea Co.*, 14 Ch. D. 859; *Wheatley v. Silkstone & Haigh Moor Coal Co.*, 29 Ch. D. 715; *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434; 61 L. J. Ch. 256; *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700; *Sadler v. Worley*, [1894] 2 Ch. 170; *Robson v. Smith*, [1895] 2 Ch. 118.

(*n*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, 641.

Paragraphs
169—170

part thereof sold (o) in the ordinary course of business, as if the security had not been given, and any such dealing with a particular property, will be binding on the chargee, provided that the dealing be *completed* before the charge ceases to be merely a floating security (p). Thus, where debts are due to a company from A., the fact that A. knows that the company has issued floating securities, which compromise book debts, does not prevent him from setting off debts subsequently incurred by the company to him (q).

Effect of
floating
securities.

170. The origin of the term floating security is, so far as the present editors know, unrecorded; but they believe that the first mention of it in the law reports occurs in *Re Colonial Trust Corporation* (r), where JESSEL, M.R., made use of it. It is used by way of contradistinction to a “fixed” security, because it is not fixed on any particular property, but floats over the whole of the assets, and only becomes fixed and binding on the assets for the time being of the company, in the event of a receiver being appointed, or a winding-up ordered and resolved upon, or perhaps (where expressly agreed) the happening of some other agreed event (s). Until then the company (if so authorized by its regulations) may sell, lease (or unless expressly prohibited by the conditions of the debenture), mortgage (t), or otherwise deal with its property *in the ordinary course of its business* (but not otherwise (u)), without the consent or interference of the debenture holders; herein differing widely from an ordinary fixed equitable mortgage, which latter is binding on all persons dealing with the mortgaged property, who have actual or constructive notice of the charge. The subsequent dealings by the company with its assets must, however, be *bonâ fide in the ordinary course of its business*; and a sale of everything, stock, lock and barrel, for the purpose of bringing the business to an end, would not do, and would not confer a valid title on purchasers with notice of the charge (u), although it would do so if they had no notice (x).

(o) *Re Vivian & Co., Metropolitan Bank of England and Wales v. Vivian & Co.*, [1900] 2 Ch. 654.

(p) *Per* ROMER, J., *Robson v. Smith*, [1895] 2 Ch. 118, 124.

(q) *Biggerstaff v. Rowatts Wharf, Ltd.*, [1896] 2 Ch. 93; and see *E. Nelson & Co., Ltd. v. Faber & Co.*, [1903] 2 K. B. 367.

(r) 15 Ch. D. 465.

(s) *Cf. Re Horne and Hellard*, 29 Ch. D. 736; and *Government Stock, etc., Investment Co. v. Manila Rail. Co.*, [1897] A. C. 81.

(t) *Ward v. Royal Exchange Shipping Co.*, 58 L. T. 174; *Re Florence Land and Public Works Co., Exp. Moor*, 10 Ch. D. 530; *Re Hamilton's Windsor Ironworks, Exp. Pitman & Edwards*, 12 Ch. D. 707; *Re Colonial Trusts Corporation, Exp. Bradshaw*, 15 Ch. D. 465; *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681; *Wheatley v. Silkstone and Haigh Moor Coal Co.*, 29 Ch. D. 715; *Cox Moore v. Peruvian Corporation*, [1908] 1 Ch. 604.

(u) See *Hubbuck v. Helms*, 56 L. T. 232.

(x) *English and Scottish Mercantile Investment Trust v. Brunton*, [1892] 2 Q. B. 700.

In short, the undertaking must not cease to be a going concern, for directly that happens the floating charge becomes fixed (*a*). Paragraphs
170—173

171. The subsequent dealing need not necessarily be a voluntary act on the part of the company in order to confer rights prior to those of the holder of the floating security. Thus, it has been held, that a garnishee order absolute, obtained by a judgment creditor of the company, attaching a debt due to the company, is good as against the holders of floating securities who have not obtained the appointment of a receiver (*b*). But the reason of that decision was, that the garnishee order absolute constituted a fixed charge, which was completed before the floating security ceased to be such. Consequently, in another case (*c*), it was held that, where the sheriff had seized the company's goods under a *fi. fa.*, the appointment of a receiver, at the instance of the holders of floating securities, *before the sheriff had sold the goods*, nullified the rights of the execution creditor. But on the other hand where the company had paid sums to the sheriff on account of a judgment debt and in order to get him out of possession, the payments so made were held to be good as against the debenture holders (*d*).

172. But although a floating security (in the absence of express stipulation to the contrary) enables a company to create other charges in priority to it, in the ordinary course of its business, such charges must be *fixed* charges. A second *floating security* will, therefore, not take priority of a prior one, whether the second chargees had notice of the prior one or not. Thus where a company issued debenture stock, purporting to be a first charge by way of floating security on its property, and afterwards issued debentures to other persons, which also purported to be a first charge by way of floating security, it was held that the holders of these debentures (whether they had or had not notice of the issue of the debenture stock) did not obtain priority over but ranked after the stock holders (*e*).

173. The use of the words "floating security" is not essential to the creation of one. Thus, in *Re Florence Land & Public Works* Use of term
"floating
security" not

(*a*) *Government Stock, etc., Investment Co. v. Manila Rail. Co.*, [1897] A. C. 86 ; *Re Borax Co., Foster v. Borax Co.*, [1901] 1 Ch. 326.

(*b*) *Robson v. Smith*, [1895] 2 Ch. 118.

(*c*) *Taunton v. Sheriff of Warwickshire*, [1895] 2 Ch. 319 ; and see also *Re Opera, Limited*, [1891] 3 Ch. 260 ; and *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314. Where the debenture was actually issued without authority but being under the company's seal estopped them ; and see also *Simultaneous Colour Printing Syndicate v. Foweraker*, [1901] 1 Q. B. 771.

(*d*) *Robinson v. Burnell's Vienna Bakery Co.*, [1904] 2 K. B. 624.

(*e*) *Smith v. English and Scottish Mercantile Investment Trust*, W. N., 1896, p. 86.

Paragraphs
173—174

essential to
the creation
of one.

Effect of a
floating
security in
the case of
railway and
other com-
panies
incorporated
by Parliament
to carry out
public works.

Co. (f) (which is one of the early leading cases on this class of instruments), the debentures merely purported to *bind* all the company's "estate, property, and effects," and this was held to constitute a floating security, subject to the power of the directors to dispose of any part of such property in the ordinary course of their business. A similar effect was given to a mere charge on "the undertaking, and all sums of money arising therefrom" in *Re Panama, etc., Royal Mail Co. (g)*. However, it is now usual for debentures to declare in express terms, that "the charge hereby created is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures" (*h*).

174. But, although the legal effect of a floating charge is, in the case of ordinary companies (such as steamship companies, manufacturing companies, financial companies, and the like), to entitle the debenture holders to a general charge on all the property of the company in existence at the date of the receiver being appointed or a winding up resolved on or ordered, there is an important exception in the case of companies formed for what may be called public purposes, such as railway companies, and tramway companies, and (it is submitted) waterworks companies, gas companies, electric light companies, and the like. In the case of such companies, a general charge on the assets or undertaking, imports, not the surplus or other lands, capital, rolling, or other stock, or any other of the separate ingredients of which the whole undertaking is composed, nor even the whole undertaking as a thing with the validity of which the debenture holder, by exercising the ordinary remedies of a mortgagee, may interfere; but as concerns his power over it, the complete undertaking only, as a going concern or fruit-bearing tree, the produce of which, and not the thing itself constitutes the security. The principal ground of this construction is, that a mortgage which would enable the creditor at his pleasure to enforce the ordinary remedies of a mortgagee against the whole or any particular part of the undertaking of the company, the debentures of which are in question, would be inconsistent with the primary object for the attainment of which the powers of the company (including the power of mortgaging) were granted—as, in the case of a railway or tramway (*i*) company, the object of making and maintaining a great public

(*f*) 10 Ch. D. 530.

(*g*) L. R. 5 Ch. 318; and see also *Re Colonial Trusts Corporation, Exp. Bradshaw*, 15 Ch. D. 472.

(*h*) *Per KEKEWICH, J., Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434, 440.

(*i*) *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36; *Pegge v. Neath District Tramways Co.*, [1895] 2 Ch. 508.

communication (*k*). And, indeed, a debenture holder or other mortgagee of such an undertaking is not allowed to foreclose, nor to sell the undertaking, or its lands or works, nor to take possession under an *elegit*, or otherwise than by means of a receiver of its revenues. Nor will a manager be appointed in such cases. The same principle applies to mortgages of public bodies, such as drainage or dock commissioners, and the like (*l*).

Paragraphs
174—176

175. Not only the property, but even the uncalled capital of a company may be charged, if the memorandum of association or Act of Parliament so permits. It will not, however, be charged, where the debenture merely purports to charge the “property, and the receipts and revenues to arise therefrom” (*m*). Nor where a company has by special resolution declared that a part of its capital shall only be capable of being called up for the purposes of liquidation can it create any charge on that part (*n*). And the word “estate” in a mortgage of the lands, tenements, and estate of a company and of all their undertaking, means estate *ejusdem generis* with lands and tenements, and does not comprise as part of the estate or undertaking, even unpaid calls, which are mere debts; or capital not called up (*o*). But on the other hand, uncalled capital passes by the use of the words “property, assets, and revenues,” where the company has, by its memorandum, power to charge uncalled capital (*p*) (**287**).

Uncalled
capital may
be included
in floating
security.

176. Where uncalled capital is mortgaged, that does not give the debenture holders any right to sue the shareholders, or to make

Remedy of
debenture
holders when

(*k*) As to the liability of a company and its creditors to use the property for the purposes of the undertaking, see further, *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. 104, 125; *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 142. But see as to the effect of a specific charge on a specific fund, *Proffitt v. Wye Valley Rail. Co.*, 64 L. T. 669, which is difficult to reconcile with the above authorities.

(*l*) See *Ames v. Birkenhead Docks Trustees*, 20 Beav. 332; *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay 142; *Fripp v. Chard Rail. Co.*, 11 Hare 241; *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. 104; *Gardner v. London, Chatham & Dover Rail. Co.*, L. R. 2 Ch. 201; *Re Exmouth Docks Co.*, L. R. 17 Eq. 181; *Re Herne Bay Waterworks Co.*, 10 Ch. D. 42; *Blaker v. Herts and Essex Waterworks Co.*, 41 Ch. D. 399; *Re Eastern & Midlands Rail. Co.*, 45 Ch. D. 367.

(*m*) *Stanley's Case*, 4 De G. J. & S. 407. The addition of the words “present and future” will not extend the word “property” to uncalled capital. *Re Streatham and General Estates Co.*, [1897] 1 Ch. 15.

(*n*) *Re Mayfair Property Co.*, *Bartlett v. The Co.*, [1898] 2 Ch. 28, referred to in *Re Irish Club Co.*, [1906] W. N. 127.

(*o*) *King v. Marshall*, 33 Beav. 565; 10 Jur. (N.S.) 921; *Re Marine Mansions Co.*, L. R. 4 Eq. 601; *Re Colonial Trusts Corporation*, *Exp. Bradshaw*, 15 Ch. D. 465.

(*p*) *Page v. International Agency and Industrial Trust*, 62 L. J. Ch. 610; *Hulme v. Drachenfels Banket Gold Mining Syndicate*, 13 R. 345.

Paragraphs
176—179

uncalled
capital is
charged.

Effect of a
company
mortgaging
its unissued
debentures.

When a
majority
of debenture
holders can
control a
minority.

Remedy by
foreclosure
applicable to
ordinary
mortgage
debentures.

calls. And if the directors decline to make a call, the only remedy of the debenture holders, is to get a winding-up order and to induce the court to order the liquidator to make a call. The court will then, *in the debenture holders' action*, empower the receiver to get in the call in the name of the liquidator (q).

177. A company empowered to issue mortgage debentures may mortgage them, and on winding up, the mortgagees may prove for the sums due on the debentures, *pari passu* with the other debenture holders, but receiving only their principal, interest, and costs (r).

178. The power given to the court by the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104, s. 2), to sanction schemes between a company and its creditors, extends to debenture holders; and the court has jurisdiction to deprive them of their securities, and to force fully paid up shares on them in lieu thereof, if satisfied that the scheme is fair and equitable, but not otherwise (s). But except under the provisions of this Act, or under the express conditions of the debentures themselves (t), no majority of debenture holders can bind a dissentient minority, even where the effect of their dissent is to ruin the securities (u).

179. A debenture of an ordinary limited company in the usual form of a floating security, confers upon the holder (in the event of a winding up) the ordinary mortgagee's remedy by foreclosure (x), even although the time named in the debenture for payment has not arrived (y). But it would seem, from a decision of the late

(q) *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724.

(r) *Re Regents Canal Ironworks Co.*, 3 Ch. D. 43 and see *Re Vint and Sons, Ltd.*, [1905] 1 I. R. 112.

(s) *Re Empire Mining Co.*, 44 Ch. D. 402; *Re Alabama, etc. Co.*, [1891] 1 Ch. 213.

(t) *Follitt v. Eddystone Granite Quarries*, [1892] 3 Ch. 75, and see also *Mercantile Investment and General Trust Co. v. River Plate Trust, etc. Co.*, [1894] 1 Ch. 578; and *Sneath v. Valley Gold, Ltd.*, [1893] 1 Ch. 477; and *Collingham v. Sloper*, [1894] 3 Ch. 716.

(u) *Hay v. Swedish and Norwegian Rail Co.*, 5 T. L. R. 460.

(x) *Sadler v. Worley*, [1894] 2 Ch. 170 (where form of judgment is given); *Oldrey v. Union Works, Ltd.*, W. N. [1895] 77; *Halifax, etc., Banking Co. v. Radcliffe, Ltd.*, W. N. [1895] 63. As to declaration of right when the action is heard as "short," see *Marwick v. Lord Thurlow*, [1895] 1 Ch. 776; and *Parkinson v. Wainwright*, 64 L. J. Ch. 493; 72 L. T. 485. As to the jurisdiction of the court in case of emergency to authorize the receiver to raise money by a first charge on the undertaking, see *Greenwood v. Algeiras (Gibraltar) Rail. Co.*, [1894] 2 Ch. 205. But as to the circumstances under which money will be allowed to be raised for "salvage" purposes, see *Securities and Properties Corporation v. Brighton Alhambra*, W. N. [1893] 15. For Form of consent order for sale of business by receiver as a going concern, see *Makins v. Percy Ibbotson & Sons*, [1891] 1 Ch. 133; *Campbell v. Lloyd's, etc., Bank, Ltd.*, [1891] 1 Ch. 136 n.; and *Whitley v. Challis*, [1892] 1 Ch. 64.

(y) *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547.

Mr. Justice *Kekewich*, that unless *all* the debenture holders are before the Court, no judgment can be given for foreclosure, but only for sale and distribution of the proceeds (z).

Paragraphs
179—183

180. The court will appoint a receiver to protect the debenture holders' security, if it be in jeopardy, although the principal is not immediately payable, nor the interest in arrear, nor a winding up order made, nor resolution for winding up passed (a); and will similarly direct a sale under Ord. 51, r. 1 b (b).

Receiver will
be appointed
directly
security is
endangered.

181. Mortgage debentures, complete in themselves, must not be confused with debentures, or debenture stock, secured by a covering trust deed, by which property is vested by the company in trustees, in trust to secure the principal and interest payable in respect of the debentures. Such deeds are frequently *legal* mortgages of the company's lands (where they have power to mortgage lands), but they may, and frequently do, also contain a floating charge over all the company's property, which gives the trustees similar rights, which each debenture holder would have in the case of ordinary mortgage debentures. Sometimes, too, ordinary mortgage debentures are *further* secured by a covering trust deed, which, of course, prevents the company creating subsequent mortgages of its real property or leaseholds without the consent of the trustees of such deed.

Effect of a
covering
trust deed.

182. There is also a kind of debenture stock issued under the provisions of the Companies' Clauses Act, 1863, by companies incorporated by special Act of Parliament, which scarcely comes under the description of mortgage at all; for (1) it is irredeemable by the company, (2) the interest is exclusively payable out of profits, and (3) it cannot be enforced by foreclosure or sale. If the interest falls into arrear, the debenture holders may obtain the appointment of a receiver, and they rank before all ordinary creditors. Such stock is therefore rather of the nature of a pre-preference stock, or a perpetual annuity (c).

Debenture
stock issued
under
Companies'
Clauses Act.

183. There is also another kind of debenture issued by land securities companies under the provisions of the Mortgage Debenture

Debentures of
land
companies

(z) *Re Continental Oxygen Co., Elias v. The Co.*, [1897] 1 Ch. 511.

(a) *McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148; *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574; *Bissil v. Bradford Tramways Co.*, W. N. [1891] 51. *Re Victoria Steamboats, Limited, Smith v. Wilkinson*, [1897] 1 Ch. 158; *Re London Pressed Hinge Co., Campbell v. The Co.*, [1905] 1 Ch. 576.

(b) *Re Day and Night Advertising Co.*, 48 W. R. 362, and *Re Crigglestone Coal Co., Stewart v. The Co.*, [1906] 1 Ch. 523.

(c) See *Attree v. Hawe*, 9 Ch. D. 337.

Paragraph
183

issued
under the
Mortgage
Debenture
Acts.

Act, 1865, and the Mortgage Debenture Amendment Act, 1870 (*d*). These statutory securities can only be issued by companies formed (1) for the purpose of making advances of money on the security of lands, rates, and charges on land; or (2) for the purpose of borrowing money on transferable debentures, or on one or more of the securities above mentioned. Under these statutes, such companies are enabled to deposit with the land registry, the securities given *to them* for loans made by them; and then to borrow money on the security of the securities so deposited. In case of default, a receiver may be appointed by the court with power to realize the deposited securities (*e*).

(*d*) 28 & 29 Vict. c. 78, and 33 & 34 Vict. c. 20.

(*e*) Act of 1865, s. 41, *et seq.*, and see *Somerset v. Land Securities Co.*, [1894] 3 Ch. 464.

CHAPTER VII.

Of Transfers of Mortgages.

	PARAGRAPH	Paragraph
<i>Joinder of mortgagor is desirable but not essential</i>	184	184
<i>Effect of void mortgage on transferee</i>	185	
<i>Form and effect of transfer</i>	186	
<i>Deed generally necessary</i>	187	
<i>Manner of transferring mortgages of copyholds</i>	188	
<i>Effect of statutory transfers of statutory mortgages</i>	189	
<i>Transfer of part of a mortgage debt</i>	190	
<i>Sub-mortgages</i>	191	

184. A mortgagee is entitled to transfer his security (*a*) either absolutely or by way of sub-mortgage, and with or without the concurrence of the mortgagor. It is, however, always desirable that the latter should be a party, because in his absence the transferee is bound by the state of the accounts between the mortgagor and the transferor, whatever may have been the representations of the latter to the transferee, and though he has no notice of the discharge of any part of the debt (1757) ; and as the amount of the debt and not the nature of the estate—which is only the security for it—is the subject for consideration, the possession by the transferee of a legal interest in the estate does not strengthen his position (*b*). Moreover, it has been held by the Irish Chancery Division (*c*) that where an arrear of interest is assigned, the mortgagor joining in the transfer, there is a presumption that the interest so assigned is to be capitalized and bear interest. Where, however, the mortgagor has enabled the transferor to deceive the transferee, as, for instance, by allowing it to be stated in the mortgage deed that a larger sum was advanced

Desirable but not essential that mortgagor should join in transfers of mortgage.

(*a*) *Exp. Sargent, re Tahiti Cotton Co.*, L. R. 17 Eq., at p. 279, per JESSEL, M.R., but see *France v. Clark*, 22 Ch. D. 830 ; 26 Ch. D. 257. Even such special securities as mortgages to building societies have been held to be transferable. *Ulster Permanent Building Society v. Glenton*, 21 L. R. Ir. 124 ; but this case is not free from doubt, *Re Rumney and Smith*, [1897] 2 Ch. 351 ; and even if they are the ordinary form of building society mortgage would not enable the transferee to exercise the power of sale (*ib.*).

(*b*) *Bradwell v. Catchpole*, 3 Swans. 78, n. ; *Matthews v. Wallwyn*, 4 Ves. 118 ; *Chambers v. Goldwin*, 9 Ves. 254.

(*c*) *Agnew v. King*, [1902] 1 I. R. 471. But it need scarcely be pointed out that a well-drawn transfer would expressly provide for this.

Paragraphs
184—187

than was actually the case, he will be estopped from denying it as against the transferee (*d*).

Effect on
transferee
of void
mortgage.

185. The transferee is also in no better position than the mortgagee, when the mortgage deed is absolutely *void* from the beginning, although he took for valuable consideration and without notice of the fraud (**1734**); but where the security was only *voidable* originally, it may become valid in the hands of such a transferee. A so-called mortgagee who knows that his deed is absolutely void (*ex. gr.*, where it is a forgery) is liable to the transferee unless he discloses the fact (*e*).

Form and
effect of
transfer.

186. In framing a transfer of a mortgage, it is usual besides conveying the estate, subject to the equity of redemption, to make a separate assignment of the debt, when the mortgagor is not a party, or when being a party, it is desired to show an intention to keep the original debt alive for the protection of the transferee or other purchaser, against mesne incumbrancers. But the security for the debt, although not the right to sue the debtor personally for payment, will pass by the mere transfer of the mortgaged property; for it is only by payment of the debt that the property can be taken from the transferee (*f*). Thus, if by inadvertence the property is conveyed to the transferee but the debt is omitted to be expressly transferred it is apprehended that the right to give a good discharge for the debt and to exercise the statutory powers of sale, etc., passes to the transferee (*g*). Conversely, if the debt be assigned, and the assignment refer in terms to the security, the benefit of the security will pass (*h*). A transfer of mortgage will not without express words carry with it the right to rent in arrear (*i*).

Deed
generally
necessary.

187. In the case of a *legal* mortgage, however (unless it be of copyholds), a deed is necessary to a complete transfer, as otherwise the legal estate will remain in the transferor. Even in the case of an equitable mortgage the right to sue *at law* for the debt can only be transferred *by writing* under the hand of the transferor accompanied by notice to the debtor. Where the transfer is a voluntary transfer, all formalities necessary for the complete transfer of the mortgage *at law* must be complied with, otherwise the transfer will be an incomplete gift and void even where the deeds have been handed over (*k*). Where, however, there is valuable consideration for the transfer, the fact that legal formalities have not been complied with

(*d*) *Bickerton v. Walker*, 31 Ch. D. 151; 55 L. J. Ch. 227.

(*e*) *Marnham v. Weaver*, 80 L. T. 412.

(*f*) *Jones v. Gibbons*, 9 Ves., at p. 411, *per* Sir W. GRANT.

(*g*) See *Rayne v. Baker*, 1 Giff. 241, and *Dryden v. Frost*, 3 Myl. & Cr. 670; and as to power of sale, etc., see *Boyd v. Petrie*, L. R. 7 Ch. 385.

(*h*) *Exp. Smith, re Manning*, 2 Dea. & C. 271, *per* Sir G. ROSE.

(*i*) *Salmon v. Dean*, 3 Mac. & G. 344.

(*k*) *Edwards v. Jones*, 1 Myl. & Cr. 226; *Re Richardson, Shillito v. Hobson*, 30 Ch. D. 396.

will be immaterial, as between transferor and transferee, inasmuch as equity in such cases treats the transaction as an *agreement* to make over the benefit of the mortgage, which will be enforced.

Paragraphs
187—189

188. Except for such differences in form as are made necessary by the different natures of the subjects of the security, transfers of mortgages of freehold, leasehold and personal chattel property, are framed in the same manner. A transfer of mortgage of copyholds where there has been a surrender to the mortgagee, perfected by admittance (40), is affected by the mortgagor's surrender, or covenant to surrender, to the use of the transferee; which, as in the case of an original security, may, or may not, be followed up by an immediate surrender, and the admittance of the transferee.

Manner of
transferring
mortgages of
copyholds.

If there have been no admittance on the original surrender, the course is to take a new covenant or surrender from the mortgagor, and to enter satisfaction on the original security, unless the existence of a later conditional surrender makes it desirable not to do so. But in case of a sub-mortgage, or otherwise, if the mortgagor be not a party to the transfer, the mortgagee covenants to take admittance and to surrender to the use of the transferee; the performance of the covenant, however, being, as in the case of an original mortgage, usually postponed until it becomes necessary to act upon it.

Where no surrender has been made in pursuance of the covenant, the interest of the covenantee may be assigned, and the assignee will be entitled to admittance on payment of only a single fine, even though the agreement to assign have been presented by the homage (l).

189. The statutory transfer of a *statutory* mortgage of freehold or leasehold land under the Conveyancing and Law of Property Act, 1881 (s. 27), may be in either of the three forms given in the third schedule to the Act, with the variations adapted to the particular case. A transfer in either of these forms vests in the person to whom the benefit of the mortgage is expressed to be transferred, the right to demand, sue for, recover, and give receipts for, the unpaid mortgage money, and the interest due and to become due, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with, and to exercise all powers of the mortgagee. And all the estate and interest, subject to redemption, of the mortgagee in the mortgaged lands, vests in the transferee subject to redemption.

Effect of
statutory
transfers of
statutory
mortgages.

A deed of transfer in the form (B) also includes and implies a covenant with the transferee by the person expressed to join as covenantor, that he will pay to the transferee the stated mortgage money with interest. And a deed of transfer in the form (C) operates

Paragraphs
189—191

not only as a statutory transfer of mortgage, but also as a statutory mortgage ; but is not liable to any increased stamp duty by reason only of its being designated a mortgage.

It must be carefully borne in mind, however, that these statutory transfers are only applicable to statutory mortgages, and do not have the effects above stated with regard to mortgages which are not statutory. Thus the words “ the benefit of the mortgage ” will not of themselves pass the legal estate in leaseholds not mortgaged in the statutory form. There must be an apparent intention to pass the legal estate (*m*).

Transfer of
part of a
mortgage
debt.

190. It is sometimes desired to transfer part only of a mortgage debt, but as the mortgagee's remedies by sale, foreclosure, etc., are indivisible, this can only be effected in one of three ways, viz. (1) by the mortgagee declaring himself a trustee for the transferee of so much of the debt as is intended to be assigned, or (2) by transferring the whole debt to a trustee for both mortgagee and partial assignee, or (3) by the joinder of the mortgagor and the consequent severance of the mortgage into two separate mortgages each with its own powers of sale, etc. In either of the three cases the deed must state whether the amounts respectively retained by the mortgagee and assigned to the assignee are to rank *pari passu* or whether one is to rank in priority to the other.

Sub-
mortgages.

191. Mortgages are frequently transferred by way of sub-mortgage. In that case the sub-mortgage is a compound mortgage consisting of a mortgage of a chose in action (viz. the original mortgage debt) and of the property which is the security for the original mortgage debt. Doubts have been expressed whether on a sub-mortgage, where the original mortgage contained an *express* power of sale, such power could be exercised by the sub-mortgagee or whether it would not be suspended or even discharged (*n*). But it seems clear that if (as in most well-drawn powers and as in the case of the statutory power) the power is made expressly exercisable by any person entitled to give a receipt for the mortgage debt, the sub-mortgagee would be capable of executing it.

A sub-mortgagee may prove against the estate of an insolvent or bankrupt mortgagor for the whole mortgage debt, but, of course, cannot receive more than his own principal interest and costs (*o*).

(*m*) *Re Beachey, Heaton v. Beachey*, 1904, 1 Ch. 67.

(*n*) *Cruse v. Nowell*, 2 Jur. (N.S.) 536

(*o*) See *Re Burrell, Burrell v. Smith*, L. R. 7 Eq. 399.

CHAPTER VIII.

Of Pawns or Pledges.

Section I.—Of Ordinary Pledges.

„ II.—Of Pledges under the Pawnbrokers Act.

SECTION I.

Of Ordinary Pledges.

	PARAGRAPH	Paragraph
<i>Definition and effect of pledge</i>	192	192
<i>Tender of debt after day fixed for payment</i>	193	
<i>Delivery to pledgee must be actual or constructive</i>	194	
<i>Effect of re-delivery of pledge to pledgor before discharge of debt</i>	195	
<i>Pledge must be made by way of security</i>	196	
<i>Rights of third parties in the thing pledged</i>	197	
<i>Pledgee may transfer pledge</i>	198	
<i>Pledgor may sell his right to redeem</i>	199	
<i>Mere refusal to deliver goods to pledgor is not conversion</i>	200	
<i>Pledgee may deliver goods to true owner</i>	201	
<i>Remedy of pledgee is sale and not foreclosure</i>	202	
<i>Pledgor's creditors can only stand in his place</i>	203	
<i>Creditors of pledgee cannot, in general, take pledge free from right of redemption</i>	204	

192. As has been above stated (3), a pledge or pawn is a security by way of bailment of a personal chattel, to be kept by the pledgee till the security is discharged. It is created by, and is incomplete without, an actual or constructive delivery of the thing pledged, to, or on behalf of the pledgee (a), and it confers a special or qualified property in the pledge (b), sufficient to support an action against a person who wrongfully converts it (c), the general property remaining in the pledgor (a).

The property pledged may be anything of a personal nature

(a) *Reeves v. Capper*, 5 Bing., N. C. 136; *Martin v. Reid*, 11 C. B. (n.s.) 730. See *Belcher v. Oldfield*, 6 Bing., N. C. 102; Story, Bailm. § 287. The contract of pawn is only perfected when the creditor has possession of the pledge. (*Hedaya*, Pawns, Ch. 1.)

(b) *Ratcliff v. Davies*, Cro. J. 244; Yelv. 178; *Coggs v. Bernard*, 2 Ld. Raym. 909; 3 Salk. 268; Holt, 528; per HOLT, C.J., *Franklin v. Neate*, 13 Mee. & W., 481.

(c) *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548, per MELLISH, L.J.; *Bristol and West of England Bank v. Midland Ry. Co.*, [1891] 2 Q. B. 653.

Paragraphs
192—194

whether corporeal or otherwise, so that it be in existence and capable of actual or symbolic delivery, and that the pawnor or some person by whose consent he pawns have a present possession and title (*d*).

The pledgee is entitled to hold every separate thing which is comprised in the pledge, and also whatever by natural increase (683) becomes accessory to it, as a security for the whole debt (*d*).

Pledgee
entitled to
actual
increase of
things
pledged as
security.
Tender of
debt after
day fixed
for payment.

193. Upon non-payment at the day (if any be fixed) the absolute property does not vest in the pledgee, and the pledgor after tender may sue for the chattel (*e*); but upon payment or tender of the debt to the pledgee, the property in the goods, notwithstanding his refusal to deliver them, is instantly revested in the owner (*f*) (915, 1500). Actual tender or payment is, however, essential to this, and the mere denial by the pledgee of the pledgor's right to redeem does not give the latter the right to sue for the articles pledged except, of course, by way of a redemption action (*g*).

Delivery
actual or
constructive.

194. The delivery need not be actual, but may be symbolic—and the latter kind of delivery may be either of goods which are, or are not, in the actual custody of the pledgor—of those which are, by delivery of the key of the warehouse in which they are contained (*h*), or of other evidence and means of obtaining possession: and of those which are not, by delivery of the documents of title; as the bill of lading of goods at sea, delivery of which will carry the right of possession even after the landing of the goods, so long as they have not come to the hands of the person entitled to receive them under the bill of lading (*i*); or by a request note entered in the book of the office of customs, to hold the goods subject to the order of the pledgee (*k*). Or the possession of the pledgor himself may be deemed sufficient if, by the contract, it be made the

(*d*) Story on Bailments, §§ 290, 294. *Per* HOLT, C.J., *Coggs v. Bernard*, *supra*.

(*e*) Com. Dig. 5, 149; Story, Bailm. §§ 345, 346. See Glanv. bk. 10, cc. 6, 8.

(*f*) Yelv. 178; *Ryall v. Rolle*, 1 Atk. 165; *per* DODDERIDGE, J., in *Isaack v. Clark*, 2 Bulst. 306. It seems that the property would not be revested on tender by one only of several joint owners; but it was only decided that trover would not lie on refusal to deliver. *Harper v. Godsell*, L. R. 5 Q. B. 422.

(*g*) *Yungmann v. Breismann*, 67 L. T. 642.

(*h*) See *Hilton v. Tucker*, 39 Ch. D. 669; 57 L. J. Ch. 973; 59 L. T. 172. A letter referring to the delivery of the key is not a bill of sale within the Bills of Sale Acts, 1878 and 1882.

(*i*) Story, Bailm. § 297; *Ryall v. Rolle*, 1 Atk., at p. 171, *per* BURNETT, J.; *Atkinson v. Maling*, 2 T. R. 462; *Exp. Westzinthus*, 5 B. & Ad. 817; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661; (H. L.) *sub nom. Barber v. Meyerstein*, L. R. 4 H. L. 317. In the last case the goods were landed at a sufferance wharf, at which, by 11 & 12 Vict. c. 18, they remained subject to the same liabilities as when afloat; and see Merchant Shipping Act, 1894, s. 494. The question whether the indorsement of bills of lading to a lender passes the absolute property to the goods, so as to bring the case within the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), or only creates a pledge, is one of intention. Where the bills of sale were indorsed and delivered by way of security, it was held that only a pledge was created. *Sewell v. Burdick*, 10 App. Cas. 74; see *Meyerstein v. Barber*, *supra*; *Barber v. Meyerstein*, *supra*.

(*k*) *Young v. Lambert*, L. R. 3 P. C. 142.

possession of the pledgee (*l*) ; while that of the pledgee will not be affected by reason that the pledgor has the use of the chattel, provided it remain under the pledgee's control, and that the user be for the purpose of carrying out or be consistent with the contract (*m*) (1590).

Paragraphs
194—197

195. The re-delivery of the thing pledged by the pledgee (even where he has a power of sale) to the pledgor, for the purpose of sale, does not destroy the security either in favour of the pledgor or his creditors (*n*).

Effect of
re-delivery of
pledge to the
pledgor.

196. It is of the essence of the contract that the thing should be held as security for some debt or engagement, either of the pledgor or of some other person. The pledge may be delivered as security either for a future or for a past debt or engagement ; for one or many debts or engagements ; upon condition or absolutely ; or for a limited or indefinite time. It may be implied from circumstances, as well as arise by express agreement ; and is not confined to engagements for the payment of money, but may be applied to any other lawful contract (*o*).

Pledge must
be made as
a security for
a debt or
engagement.

197. The pledgor impliedly undertakes (*p*) that he has an interest in the pledge, and that it shall be made effectual to answer the obligation. But it is not indispensable that the pledge should belong to the pledgor ; it is sufficient if he pledged with the consent of the owner, and it will be a good pledge even without his consent *as between the parties*. For the pledgor cannot assert that he is not the owner, and the pledgee cannot set up a *jus tertii* unless the third person enforces his own superior right of property (*q*). But as against the real owner the pawnee will not acquire a special property in the chattel, if the person who assumes to pledge be himself without title ; for the pawnee can have no greater right than the pawnor (*r*), and the Factors Act, 1889, makes no difference as to this except where the pawnor is either a mercantile agent entrusted with the goods under section 2 or a person who has agreed (*i.e.* bound himself) to purchase them under section 9 (*s*). The mere possession, obtained through false representations, of a document of title to a chattel will not support the title of a *bonâ fide* pawnee of the chattel for value, though without notice of the pledgor's want of title (*t*) ; and as there is

Rights of
third parties.

(*l*) *Reeves v. Capper*, 5 Bing. N. C. 136 ; *Martin v. Reid*, 11 C. B. (N.S.) 730 ; *Meyerstein v. Barber*, L. R. 2 C. P., at p. 52, *per WILLES, J.*

(*m*) *Crowfoot v. London Dock Co.*, 2 Cr. & M. 637.

(*n*) *North Western Bank v. Poynter*, [1895] A. C. 56. (*o*) *Story*, Bailm. § 300.

(*p*) *Id.* § 311 ; *per POLLOCK, C.B., Cheesman v. Exall*, 6 Ex. 341.

(*q*) *Story*, Bailm. § 291. See *Garth v. Howard*, 5 Car. & P. 346, 350.

(*r*) *Hooper v. Ramsbottom*, 4 Camp. 121 ; *Cheesman v. Exall*, 6 Ex. 341 ; see *Waller v. Hanger*, 3 Bulst. 17. "A custom was claymed in London, that if one did deliver goods in London in pledge to another, and the goods proved to be the goods of another, yet that he might keep them till he was satisfied. And held a bad custom ; see 35 H. 6. p. 25 ; Ca. 33." (*Sheppard's "Abr. Custome."*)

(*s*) *Helby v. Matthews*, [1895] A. C. 471, and *Weiner v. Harris*, [1910] 1 K. B. 285.

(*t*) *Kingsford v. Merry*, 26 L. J. Ex. 83 ; 1 H. & N. 503 ; *Lamb v. Attenborough*, 1 B. & S. 831.

Paragraphs
197—198

no conversion until the pawnee has refused delivery on the demand of the rightful owner, the Statute of Limitations does not run against the latter until that event (*u*). Even where the pawnor, remaining in possession for a limited purpose under the original contract of pawn, or by the fraudulent use of a document of title, affects to pledge the chattel to another, the right remains in the first pawnee, though the second have actually obtained possession and have sold the chattel (*v*). But if it be part of the contract that the pledge shall be given up on sale by the pledgor, and that the pledgee shall be paid out of the proceeds, and the pledgor obtains possession on a false statement of sale, and repledges, the original pledgee cannot recover against the new pledgee, though he might have done so against the pledgor before he had parted with possession (*w*).

So if the pawnor be tenant for life, or for years, the pledge will only be co-extensive with his interest, and the pawnee will have no further claim upon the chattels after the determination of that interest, though he had no notice of the settlement (*x*). And the bailee of goods of tenants in common, cannot, by the direction of one of them, justify a pledge of the whole (*y*).

The custom of London as to sales in market overt has no application to pledges (*z*).

Pawnee may
transfer
pledge.

198. If there be no stipulation to the contrary, the pawnee may, by common law, even before condition broken, deliver over the pawn into the hands of a stranger for safe custody, without consideration; or he may sell his interest in the pawn, or assign it unconditionally by way of pawn, without destroying or invalidating the security (*a*). But if he pledge the property, not being a negotiable security (for the lawful possessor of such a security may either pledge or sell it, so as to bind the rights of the owner (*b*)), for a greater interest than he possesses, it is a breach of contract; but the act does not annihilate the contract of pledge between him and the original pawnor, but it is inoperative against the latter; who upon tender of the sum secured becomes entitled to possession, and can recover for special damage sustained by the repledging. But without tender, he is not entitled to possession, and can only maintain an action for any damage.

Therefore where, upon non-payment on a certain day, the pledgee

(*u*) *Spackman v. Foster*, 11 Q. B. D. 99.

(*v*) *Reeves v. Capper*, 5 Bing. N. C. 136; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661; (H.L.) *Barber v. Meyerstein*, L. R. 4 H. L. 317. See *Higgins v. Burton*, 26 L. J. Ex. 342.

(*w*) *Babcock v. Lawson*, 4 Q. B. D. 394; 5 Q. B. D. 284.

(*x*) *Hoare v. Parker*, 2 T. R. 376.

(*y*) *Barton v. Williams*, 5 B. & Ald. 395.

(*z*) *Hartop v. Hoare*, 3 Atk. 44.

(*a*) *Story*, Bailm. § 324. See *per* COOK, WARBURTON and DANIEL, J.J., in *Mores v. Conham*, Owen, 123.

(*b*) *Story*, Bailm. § 296; *Miller v. Race*, 1 Bur. 452; *Grant v. Vaughan*, 3 Bur. 1516; *Woakey v. Pole*, 4 B. & Ald. 1.

was empowered to sell, but sold before and delivered upon that day, although it was held to be a wrongful conversion, the interest of the pledgee in the property was considered not to have been destroyed; and as it appeared that the pledgor never intended to redeem, his right to damages was treated as only nominal, and as if he had sued on a breach of contract for not keeping the pledge till the day fixed (c). And again, where the pawnee had repledged for a larger sum than was due to him on the original pawn, it was held that the pawnor could not bring detinue against the second pawnee, without tendering the amount due to the first pawnee (d).

Paragraphs
198—203

199. Conversely the pledgor may sell and transfer to the purchaser all his right in the pledge, so as to give him a right to sue in trover on tender of the amount due (e).

Pledgor may sell his right of redemption.

200. The mere refusal to re-deliver the pledge to the pawnor is not a conversion. It is for a jury to say whether the holder intended to apply it to his own use, to assert the title of a third person, or only to ascertain the true ownership; and in the latter case whether a reasonable time had elapsed for that purpose (f).

Mere refusal to re-deliver pledge to pawnor not a conversion.

201. If the pledgor be not the true owner of the chattel, and have no special property in it which he may assert against the true owner, the pawnee may deliver the chattel to the latter (g); being however answerable in damages (though they may be only nominal), if he have absolutely contracted to re-deliver it to the pawnor (h). Or, if the pawnor held the chattel merely as a pledge for the true owner, the second pawnee may discharge himself by delivering it to his own pawnor, at any time before an offer by the true owner to redeem (i).

Pledgee may deliver goods to true owner.

202. An ordinary pledgee is entitled, without any express power, to sell the pledge upon non-payment of the debt, when a day has been fixed for payment; or where no day has been fixed then after a proper and reasonable demand and notice (928). The pledgee cannot, however, foreclose (928); and a special agreement that the pledgee shall have a power of sale appears not to alter the general nature of the transaction (i), or to turn it into a mortgage (928).

Remedy of pledgee is sale and not foreclosure.

203. In cases of executions against private persons, a creditor of the pawnor cannot take the pledge from the pawnee, without first discharging the pawnee's claim, or otherwise extinguishing his

Pawnor's creditors can only stand in his place.

(c) *Johnstone v. Stear*, 15 C. B. (N.S.) 330; 10 Jur. (N.S.) 99; *Donald v. Suckling*, L. R. 1 Q. B. 585; 7 B. & S. 783; *Halliday v. Holgate*, L. R. 3 Ex. 299; see *Chinery v. Viall*, 5 H. & N. 288; *Brierly v. Kendall*, 17 Q. B. 937; *Story*, Bailm. § 315.

(d) *Donald v. Suckling*, *supra*.

(e) *Franklin v. Neate*, 13 Mee. & W. 481; *Story*, Bailm. § 350.

(f) *Vaughan v. Watt*, 6 Mee. & W. 492.

(g) *Story*, Bailm. § 340.

(h) *Per Pollock*, C.B., in *Cheesman v. Exall*, 6 Ex. 341.

(i) *Franklin v. Neate*, 13 Mee. & W. 481.

Paragraphs
203—205

title (j). But the right of the Crown is good against the pledgee as to duties for which the pledgor was responsible at the date of the pledge (k).

Creditors of
pawnee
cannot in
general take
the pawn
free from
right of
redemption.

204. The pawn is protected against distress or execution for the debt of the pawnee when he is a professional pawnbroker, upon the principle generally applicable to goods intrusted to persons who carry on a public trade, and who manage and deal with goods in the way of their trade (l); as well as because the pawnee is bound to restore the pledge upon redemption (191), which appears to be a sufficient ground for protection in the case of a pawn made in favour of a private person.

SECTION II.

Of Pledges under the Pawnbrokers Act.

	PARAGRAPH
Definition of Pawnbroker	205
Liabilities and rights of personal representatives of pawnbrokers	206
Liability of pawnbrokers for the acts of their employees	207
Act only applies to small loans	208
Pawnbrokers must keep certain prescribed books, etc.	209
Pawn tickets	210
Rate of interest allowed	211
Charges allowed to be made by pawnbrokers	212
Courts of criminal jurisdiction empowered to order delivery up by pawn- brokers of goods fraudulently pledged	213
Criminal offences committed by pawnbrokers and pawnors	214

Definition of
pawnbroker.

205. The business of professional pawnees or pawnbrokers is regulated by the Pawnbrokers Act, 1872 (m), by which a pawnbroker is defined to be a person who carries on the business of taking goods and chattels in pawn, i.e., who keeps a shop for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases, or receives, or takes in goods or chattels, and pays, or advances, or lends thereon any sum of money not exceeding 10l., with or under an agreement or understanding, express or implied (or to be from the nature and character of the dealing reasonably inferred), that these goods or chattels may be afterwards redeemed or re-purchased Every such transaction, article, payment, advance

(j) Story, Bailm. § 353.
(k) Att.-Gen. v. Trueman, 11 Mee. & W. 694.
(l) Swire v. Leach, 18 C. B. (N.S.) 479; 11 Jur. (N.S.) 161. The protection of the pledge from distress is probably of great antiquity. By the forest laws "if one bee amerced, and after that hee is so amerced hee doth deliver his beasts and his goods that he hath so within the forest to another in pledge or in mortgage, then the bedle of the forest, nor other officer cannot afterwards distraine them during the pledge or mortgage." (Manwood, fo. 223, ed. 1615.) So the Hedáya says, "it is recorded in the traditions, that no pledge shall be distrained for debt." (Pawns, Ch. 1.)
(m) 35 & 36 Vict. c. 93.

and loan is to be deemed a pawning pledge and loan within the Act (*n*). Paragraphs
205—211

206. The executors or administrators of deceased pawnbrokers are within the Act, but are not answerable for any penalty or forfeiture personally or out of their own estate, unless it be incurred by their own act or neglect (*o*). The rights, powers and benefits given to pawnors extend to their executors, administrators, and assigns. But, if required, they must produce to the pawnbroker the assignment, probate, letters of administration or other instrument under which they claim (*p*). Liabilities
and rights of
personal
representa-
tives of
pawnbrokers.

207. Anything done or omitted by the servant, apprentice or agent of a pawnbroker in the course of the business, shall be deemed to be done or omitted by the pawnbroker ; and anything authorized to be done by him may be done by his servant, apprentice, or agent (*q*). Liability of
pawnbroker
for acts of his
employees.

208. The Act applies to every loan by a pawnbroker of 40s. or under, and (except as is otherwise provided in relation to cases of special contract under the Act) to every loan of above 40s. and not above 10*l*. (*r*). Act only
applies to
small loans.

209. The pawnbroker is required to keep the books and documents described in the third schedule to the Act, and to make the entries and inquiries indicated (*s*). He is to keep exhibited in large characters over the outer door of his shop, and to keep placed in a conspicuous part of his shop, so as to be legible by every person pawning or redeeming, standing in any box or place provided in the shop for that purpose, the information mentioned in the Act (*t*). Pawnbrokers
must keep
certain
prescribed
books, &c.

210. A pawnbroker shall, on taking a pledge in pawn, give to the pawnor a pawn-ticket, and shall not take a pledge in pawn unless the pawnor takes a pawn-ticket (*u*). Pawn-tickets.

211. A pawnbroker may take profit on a loan on a pledge at a rate not exceeding— Interest
allowed.

A. On a loan of forty shillings or under—

For any time during which the pledge remains in pawn not exceeding one month, for every two shillings or fraction of two shillings lent, one halfpenny ;

For every month after the first, including the current month in which the pledge is redeemed, although that month is not expired, for every two shillings or fraction of two shillings lent one halfpenny.

If the pledge be redeemed before the end of the first fourteen days after the expiration of any month, in respect of those fourteen days, half of the amount which he would be entitled to take for the whole month.

(<i>n</i>) Sections 5, 6.	(<i>q</i>) Section 8.	(<i>t</i>) Section 13.
(<i>o</i>) Section 7.	(<i>r</i>) Section 10.	(<i>u</i>) Section 14.
(<i>p</i>) Section 9.	(<i>s</i>) Section 12.	

Paragraphs
211—214

B. On a loan of above forty shillings—

For every month or part of a month for every sum of two shillings and sixpence or fraction of a sum of two shillings and sixpence, one halfpenny.

Charges
allowed to
be made.

212. A pawnbroker may demand and make the charges following, viz. :—

On pawn ticket—

Where the loan is ten shillings or under, one halfpenny.

Where the loan is above ten shillings, one penny.

On inspection of sale book—

For the inspection of the entry of a sale, one penny.

On form of declaration—

Where the loan is five shillings or under, one halfpenny.

Where the loan is above five shillings, one penny.

This sum is to be paid by the applicant at the time of application.

A pawnbroker shall not, in respect of a loan on a pledge, take any profit, or demand or take any charge or sum whatever, other than those above specified (*v*)

A pawnbroker may make a special contract with the pawnor in respect of a pledge for a loan above forty shillings, provided that at the time of pawning he delivers to the pawnor a special contract pawn-ticket signed by himself; and that a duplicate thereof be signed by the pawnor. Neither the ticket nor the duplicate is subject to stamp duty (*w*).

Courts of
criminal
jurisdiction
empowered
to order
delivery up
by pawn-
broker of
goods
fraudulently
pledged.

213. If any person be convicted in a court of summary jurisdiction of knowingly and designedly pawning with a pawnbroker anything being the property of another person, the pawnor not being employed or authorized by the owner thereof to pawn the same; or be convicted in any court of feloniously taking or fraudulently obtaining any goods and chattels, and it appears to the court that the same have been pawned with a pawnbroker; or if in any proceedings before a court of summary jurisdiction it appears to the court that any goods and chattels brought before the court have been unlawfully pawned with a pawnbroker; the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner and the other circumstances of the case, seems just (*x*).

Criminal
offences
committed by
pawnbrokers
and pledgors.

214. The Act also contains various provisions in relation to offences committed by pawnbrokers and pawnors, but as these provisions relate rather to criminal law than to the law relating to pledges, it is not considered necessary to give them in this work.

CHAPTER IX.

Of Hypothecations.

	PARAGRAPHS	Paragraph
<i>Definition and classification of hypothecations</i>	215—216	215
Section I.—Of Charges, and of Agreements for Liens	217—224	
„ II.—Of Equitable Assignments	225—234	
„ III.—Of Maritime Hypothecations	235—264	

215. As above stated (4) an HYPOTHECATION is a security whereby real or personal estate is merely appropriated for the discharge of a debt or engagement, but which (except as provided by the statutory law relating to absolute assignments “not by way of charge only”) (231) does not pass either an absolute or a special property in the subject of the security to the creditor, nor any right of possession, but only a right of realization by judicial process in case of non-payment of the debt (*a*). An hypothecation may be ORDINARY or MARITIME, and the former may be created—

1. By a *charge* or direction in a settlement, will, or other instrument, whereby real or personal property is expressly or constructively made liable or specially appropriated to the discharge of a portion, legacy, or other burthen, or declared to be subjected to a lien for securing the same; no debt is implied, but a right of realization by judicial process is conferred, and in some cases a power of distress: or
2. By the appropriation to the discharge of a debt, of specific choses in action or chattels, which either are, at the time of appropriation, or may or will thereafter (*b*) be in the hands of a third person. This form of hypothecation is commonly known as an *equitable assignment* (225), and is effected either by agreement or by an order upon the holder of the property.

(*a*) See judgment of HOLT, C. J., *Johnson v. Shippen*, 2 Ld. Raym. 982; *Stainbank v. Fenning*, 11 C. B. 51; *Stainbank v. Shepard*, 17 Jur. 1032.

(*b*) *Tailby v. Official Receiver*, 13 App. Cas. 523, approving *Re Clarke, Coombe v. Carter*, 36 Ch. D. 348, and reversing *Belding v. Read*, 3 H. & C. 955, and *Re D'Epineuil, Tadman v. D'Epineuil*, 20 Ch. D. 758, in which it was held that the assignments of after acquired property were invalid.

Paragraphs
216—217

Agreement
for “liens”
create
hypotheca-
tions and not
true liens.

216. An hypothecation, although expressed to be an agreement “for a lien,” does not confer an actual lien, which is a right given by the law. In such cases the rights of the parties are limited by the terms of the express contract (c); but nevertheless, subject to the terms of the express contract or mandate, by which hypothecation in either of the above forms is effected, and to the special rights thereby created, the rights correspond with such as arise under actual liens.

SECTION I.

Of Charges, and of Agreements for Liens.

	PARAGRAPH
<i>When a charge is created by a mere covenant</i>	217
<i>Covenant to charge at a future date</i>	218
<i>Charge on lands already sold charges the purchase money</i>	219
<i>Effect of covenant in lease to keep chattels of certain value on the land</i>	220
<i>Charges or liens of companies on the shares of their members</i>	221
<i>Section 15 of Conveyancing Act applies to such charges</i>	222
<i>Company's lien does not override the rights of third parties of which the company has notice</i>	223
<i>Equitable charges created by parol or by recital</i>	224

Where a
covenant to
charge will
create a
charge.

217. A simple covenant or agreement (d) to charge land will not create a charge upon the debtor's real estate where no particular land is mentioned; or where the agreement is only for a personal, with power to call for a real security; or where it otherwise appears to be intended to rely only upon the covenant (e); or where the agreement is not based on valuable consideration (f). Therefore a covenant or written promise to give a security by mortgage, or to sell lands when required (g), or a mere covenant to settle lands of a certain value (h), or at or within a certain time, will not amount to an equitable charge. It is otherwise if the covenantor agree to charge property or the income of property already in his possession (i), or such as he may hereafter acquire of a specified kind or to be derived from a specified source (j); or if he point out by a subsequent instrument particular

(c) *Walker v. Birch*, 6 T. R. 258, per Lord KENYON; *Gladstone v. Birley*, 2 Mer., at p. 404, per Sir W. GRANT; *Re Leith's Estate*, *Chambers v. Davidson*, L. R. 1 P. C., at p. 305, per Lord WESTBURY.

(d) The principles of these decisions apply also to agreements to mortgage.

(e) *Collins v. Plummer*, 1 P. Wms. 104.

(f) *Re Earl of Lucan*, *Hardinge v. Cobden*, 45 Ch. D. 470.

(g) *Williams v. Lucas*, 2 Cox, 160; *Berrington v. Evans*, 3 Y. & C. 384.

(h) *Freemoult v. Dedire*, 1 P. Wms. 429; *Mornington v. Keene*, 2 De G. & J. 292; 4 Jur. (N.S.) 981; notwithstanding *Roundell v. Breary*, 2 Vern. 482, misreported; see 2 De G. & J. 319, note. See *Re Sankey Brook Coal Co.*, re *Radley and Bramall*, L. R. 12 Eq. 472, where the security failed because the company which gave it only as a going concern had passed into liquidation.

(i) *Legard v. Hodges*, 1 Ves. Jun. 477; *Ravenshaw v. Hollier*, 7 Sim. 3.

(j) *Metcalfe v. Archbishop of York*, 1 Myl. & Cr. 547; 6 Sim. 224; *Lyde v. Mynn*, 1 Myl. & K. 683, affirming 4 Sim. 505; *Buller v. Plunkett*, 7 Jur. (N.S.) 873.

lands as those which were intended to be charged (*k*). And where an intended husband gave a bond to convey sufficient real estate to secure his wife a certain annuity in bar of dower, which she accepted, the obligation was held (*l*) to be a charge upon the real estates of which the husband died seised in fee, but only to an amount not exceeding the dower which, but for the annuity, she might have claimed. And a bond conditioned to be void if the intended husband should become seised of any real estate in possession, and should settle it on the intended wife and the issue, was held (*m*) to bind all the real estate of which he became seised during his life, though he survived his wife and married again, and the obligation was recited to be for making better provision for the wife if she should survive him. But an obligation merely limited to the real and personal estate of the covenantor, will affect only that of which he died possessed, and not such as did not belong to him at his death, whether he had it at the date of the obligation or acquired it afterwards (*n*). Moreover a voluntary charge, as distinguished from an actual assignment, cannot be enforced; for it confers no proprietary right to the thing charged, and is therefore incomplete (*o*).

Paragraphs
217—218

218. Where the covenant is to make a charge at a future period, on the arrival of which the covenantor is in possession of lands which he has acquired for the very purpose of the charge, there will also be a charge upon those lands (*p*). And it will even be assumed, where a man has bound himself to do a certain act, and does something which may enable him to fulfil his obligation, that he acted with the view of fulfilling it. So that where there is a covenant to pay money to trustees, to be laid out in the purchase of lands, or to purchase and settle lands, and the covenantor purchases lands but does not settle them or pay the money, the lands will be taken to have been purchased in performance of, and will be subject to, the covenant (*q*). The lands must be acquired subsequently to the covenant, and by purchase, or in a manner consistent with the presumption that the object was to fulfil the covenant. Therefore there was no charge upon lands to which the covenantor was entitled at the date of the covenant, and for the conveyance of which he afterwards obtained a decree (*r*). The presumption also will not arise where the settlement contains only a power and not

Covenant to
charge at a
future period.

(*k*) *Watson v. Sadleir*, 1 Mol. 585.

(*l*) *Tew v. Earl of Winterton*, 3 Bro. C. C. 493.

(*m*) *Prebble v. Boghurst*, 1 Swans. 321. See *S. C.*, 1 Wils. Ch. 161; 7 Taunt. 538.

(*n*) *Needham v. Smith*, 4 Russ. 318.

(*o*) *Re Earl of Lucan, Hardinge v. Cobden*, 45 Ch. D. 470.

(*p*) *Wellesley v. Wellesley*, 4 Myl. & Cr. 561.

(*q*) *Sowden v. Sowden*, 1 Bro. C. C. 582; *Lechmere v. Lechmere*, Cas. temp. Talbot, 80; 3 P. Wms. 211; *Wilcocks v. Wilcocks*, 2 Vern. 558; and see *Tooke v. Hastings*, 2 Vern. 97.

(*r*) *Gardner v. Marquis Townshend*, G. Coop. 301.

Paragraphs
218—221

an express trust to purchase lands ; nor on any covenant by the husband to purchase and settle (s). And the expenditure of money by the covenantor in building upon the land of the covenantee will not be admitted as a satisfaction of the covenant to pay the money to him, where it does not appear that the outlay was so intended (t).

Charge on
lands already
sold attaches
to purchase
money.

219. And an agreement to charge a mortgage security upon an estate, which, at the date of the agreement, has been sold, will bind the interest of the person who makes the charge, in the purchase money (u).

Effect of
covenant in
lease to keep
chattels of
certain value
on the land.

220. No charge will generally be created by a covenant in a lease to keep chattels of a certain value on the premises as security for the rent, as against the assignees in bankruptcy of the covenantor claiming by virtue of his reputed ownership (v) ; though it seems that such a charge may arise where, by reason of the custom of the neighbourhood to insert such covenants in leases, possession of the chattels by the tenant may not be *prima facie* evidence of unincumbered ownership.

Charges of
companies on
the shares of
their
members.

221. A charge on the shares of its members can be conferred on a company by appropriate words contained in its articles of association or deed of settlement. Thus an express charge so conferred in respect of all shares registered in the name of a member for his debts due to the company, with a provision that while he remains indebted, his right to transfer the shares is to be dependent on the approval of the directors, is valid (x) ; and may apply even to present debts (y). But no such charge will be acquired by a company upon the shares of its shareholders, merely by a provision in the deed of settlement, that, before the shares can be transferred, all debts due from the holder to the company must be paid : nor it seems by a provision that the shares shall be forfeited if all such debts be not paid on demand (z).

Where such a charge has been created it may be discharged by a new arrangement, the terms of which are incompatible with the retention of it, a question which, of course, depends upon the circumstances of each case (a). Such a charge does not extend to shares held *in trust* for a debtor to the company, even where the articles state that the charge is to be for moneys due from a registered holder “or other, the person for the time being entitled to such shares as against the company” (b).

(s) *Lench v. Lench*, 10 Ves. 511.

(t) *Wiles v. Gresham*, 2 Drew 258.

(u) *Exp. Rogers*, 2 Jur. (N.S.) 480 ; 8 De G. M. & G. 271.

(v) *Shuttleworth v. Hernaman*, 1 De G. & J. 322.

(x) *Re General Exchange Bank*, L. R. 6 Ch. 818.

(y) *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656.

(z) *Re Dunlop, Dunlop v. Dunlop*, 21 Ch. D. 583.

(a) *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A. C. 281.

(b) *Re Perkins, Exp. Mexican, etc., Mining Co.*, 24 Q. B. D. 613.

222. It would seem that where such charges exist, s. 15 of the Conveyancing and Law of Property Act, 1881, applies, and gives the shareholder the right to have them transferred to a nominee (c). Paragraphs 222—224

223. Notwithstanding a clause in the articles of association, giving to the company “a first and permanent lien and charge available at law and in equity upon every share for all debts due from the holder thereof,” the company cannot, in respect of moneys which become due from the shareholder after notice of an equitable mortgage of the shares made by him to a bank, claim priority over advances made by the bank (d). It has been suggested (e) that the above principle does not apply if the company’s regulations profess to authorize the company to ignore all equitable rights (being thus in wider terms than those of s. 30 of the Companies Act, 1862, which merely prohibit the insertion of equities in the register); but such a distinction is inconsistent with the judgments in the case cited (f). Section 15 of Conveyancing Act applies to such charges. Company’s lien does not override the rights of third parties of which it has notice.

224. An equitable security may also be established by parol or other evidence of arrangements which are the subject of a separate agreement, or are referred to in a deed relating to the transaction out of which the security is held to arise; as where (g) incumbrancers had joined in assigning their security, upon the terms that they should be secured by subsequent mortgages, which were never executed; and were held entitled to an equitable charge as second incumbrancers. So a charge upon real estate, in favour of the obligee of a bond, by a recital therein, that the obligor had become possessed of the estate under a certain will, upon the execution whereof he had promised the testator to provide for the obligee (h). So where the rent arising under a lease was assigned to the creditor (i), there being in the assignment a recital that a security was intended, and a covenant for further assurance of the rent, the covenant was held to be in equity a covenant to make a mortgage, and the case to be within the rules of equitable mortgages. Equitable charges created by parol or by recital.

(c) *Everitt v. Automatic Weighing Machine Co.*, [1892] 3 Ch. 506.

(d) *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29, approved in *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Cas. 53, and followed in *Bank of Africa v. Salisbury Gold Mining Co.*, *supra*, following the general principle laid down in *Hopkinson v. Rolt*, 9 H. L. C. 514.

(e) See *Palmer’s Company Precedents* Edition, 1906, Part I. pp. 537–8 and 547–8, based upon Lord SELBORNE’s judgment in *Société Générale de Paris v. Walker*, 11 App. Cas. 20, and see *Re Perkins, Exp. Mexican, etc., Mining Co.*, *supra*.

(f) *Bradford Banking Co. v. Briggs*, *supra*.

(g) *Banks v. Whittall*, 1 De G. & Sm. 536; *Beckett v. Cordley*, 1 Bro. C. C. 353.

(h) *Exp. Atkins, Re London and Southampton Railway Act*, 2 Y. & Coll. Ex. 536.

(i) *Exp. Wills*, 2 Cox, 233.

Paragraphs
225—226

SECTION II.

Of Equitable Assignments.

	PARAGRAPH
<i>How equitable assignments may be created</i>	225
<i>Distinction between equitable assignments and bills of exchange</i> ..	226
<i>Equitable assignee not bound to use same diligence as holder of a bill</i> ..	227
<i>Essentials to validity of equitable assignments</i>	228
<i>Order by a firm directed to a member thereof</i>	229
<i>Charges on particular fund must be clear</i>	230
<i>Assignment of choses in action formerly invalid at law but not in equity</i> ..	231
<i>Effect of Judicature Act as to assignment of choses in action</i>	232
<i>Quære whether choses in action can now be assigned verbally</i>	233
<i>Debtor with notice of equitable assignment is bound to pay assignee</i> ..	234

How
equitable
assignments
may be
created.

225. An equitable assignment may be made either by an agreement between a debtor and his creditor, that a specific chose in action or chattel which is, or will be, in the hands of or due from a third person, and which belongs to the debtor, shall be applied in discharge of the debt (*k*); or by an order given by the debtor, whereby the holder of the *fund* is directed or authorized to pay it to the creditor (*l*). And it may be made either by writing or verbally (*m*); no particular words being necessary (*n*) so that the intention be sufficiently expressed (*o*). There appears to be no distinction in principle between an equitable assignment out and out, and an equitable assignment which is intended to operate as a security only; and though many of the authorities here cited deal with transactions of the former class, they may be regarded as applicable to the case of equitable assignments by way of hypothecation.

Distinction
between
equitable
assignments
and bills of
exchange.

226. An equitable assignment made by means of an order to pay a sum out of a particular fund, and not to pay the fund itself, does not operate as a bill of exchange within s. 32 of the Stamp Act, 1891, unless the fund is held by the party to whom the order is addressed upon the terms of applying such fund as directed by the order of the party entitled to it (*p*).

(*k*) *Row v. Dawson*, 1 Ves. Sen. 331; *Lett v. Morris*, 4 Sim. 607; *Exp. Flower*, 4 Deac. & C. 449; *Riccard v. Prichard*, 1 K. & J. 277; *Exp. Bell*, 17 L. J. Bk. 9; *Brice v. Bannister*, 3 Q. B. D. 569.

(*l*) *Row v. Dawson*, 1 Ves. Sen. 331; *Burn v. Carvalho*, 7 Sim. 109; 4 Myl. & Cr. 690; *Crowfoot v. Gurney*, 2 Moo. & Sc. 473; *Exp. Steward*, 3 Mont. D. & De G. 265; *Rodick v. Gandell*, 1 De G. M. & G. 763, per Lord TRURO; *Diplock v. Hammond*, 2 Sm. & G. 141; 5 De G. M. & G. 320.

(*m*) *Tibbits v. George*, 5 Ad. & El. 107; *Gurnell v. Gardner*, 9 Jur. (N.S.) 1220; and see *Riccard v. Prichard*, 1 K. & J. 277.

(*n*) *Row v. Dawson*, 1 Ves. Sen. 331, per Lord HARDWICKE; *Bell v. London & North Western Rail. Co.*, 15 Beav. 548, per Lord ROMILLY; see *Hopkinson v. Forster*, L. R. 19 Eq. 74.

(*o*) *Chowne v. Baylis*, 31 Beav. 351.

(*p*) See *Brice v. Bannister*, 3 Q. B. D. 569; *Buck v. Robson*, 3 Q. B. D. 686; *Adams v. Morgan*, 14 L. R. Ir. 140; *Fisher v. Calvert*, 27 W. R. 301, and cf. *Diplock v. Hammond*, 5 De G. M. & G. 320.

227. The equitable assignee of a debt is not in the same position as to the obligation of using diligence, as the holder of a bill of exchange or promissory note; but, like a mortgagee in possession, he is chargeable with wilful default (*q*) (1764).

Paragraphs
227—230

Equitable
assignee
not obliged
to use
diligence.

228. An equitable assignment will not be valid, unless there be an engagement both to pay the debt, and to pay it out of a particular fund (*r*), and to the person who claims under the assignment (*s*). Therefore the assignment of the benefit of a contract to make a loan, is not good as an equitable assignment, as there is no particular fund bound by the original contract (*t*). But it is not necessary that the exact amount either of the debt to be paid, or of that out of which it is directed to be paid, should be ascertained (*u*).

Essentials to
equitable
assignments.

229. An equitable assignment has been supported, although the holder of the goods to whom the order was addressed was a partner in the firm to which the subject of the assignment belonged, and on account of which the order was given; he being at a distance from the giver of the order (*x*).

Order by
firm to a
member
thereof.

230. The engagement that the particular fund shall be made liable to the debt must be clear. The case of *Frith v. Forbes* (*y*) has been relied on as an authority, that a mere statement communicated to the consignees of goods, that bills are “drawn against these goods,” will create a charge on the goods; but that case in reality laid down no such general proposition (*z*), and it would seem that there must be some express statement in writing by an authorized agent of the consignee, referring to goods as having been sent against bills, and promising to dispose of them in favour of bill-holders. A letter to the holder of the fund, stating that a particular person is a claimant upon it, is not an assignment (*a*); nor is an intimation to the creditor by his debtor that he has made

Charge on
particular
fund must be
clear.

(*q*) *Glyn v. Hood*, 1 De G. F. & J. 334, *per* TURNER, L.J.

(*r*) *Watson v. Duke of Wellington*, 1 Russ. & Myl. 602; *Jones v. Starkey*, 16 Jur. 510; *Thomson v. Simpson*, L. R. 5 Ch. 659; *Citizen's Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 H. L. 352.

(*s*) *Exp. Steward*, 3 Mont. D. & De G. 265; *Bell v. London & North Western Rail. Co.*, 15 Beav. 548.

(*t*) *Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271; *May v. Lane*, 64 L. J. Q. B. 236.

(*u*) *Hutchinson v. Heyworth*, 9 Ad. & El. 375; *Crowfoot v. Gurney*, 2 Moo. & Sc. 473; *Riccard v. Prichard*, 1 K. & J. 277.

(*x*) *Rayner v. Harford*, 27 L. J. Ch. 708; 4 Jur. (N.S.) 703.

(*y*) 4 De G. F. & J. 409; 32 L. J. Ch. 10; so far as this case purported to lay down any such general rule it has been over-ruled: *Brown, Shipley & Co. v. Kough*, 29 Ch. D. 848; *Ranken v. Alfaro*, 5 Ch. D. 786. As to the distinction between such a transaction and one in which the bills are drawn by the vendor against the purchaser of the goods, see *Re Entwistle, Exp. Arbuthnot*, 3 Ch. D. 477.

(*z*) See *Phelps & Co. v. Comber*, 29 Ch. D. 813; *Brown, Shipley & Co. v. Kough*, *supra*; *Robey v. Ollier*, L. R. 7 Ch. 695; *Exp. Dever, re Suse*, 13 Q. B. D. 766.

(*a*) *Watson v. Duke of Wellington*, 1 Russ. & Myl. 602.

Paragraphs
230—231

arrangements for payment of the debt out of the fund over which he still retains the control ; nor a promise to pay it out of a particular debt or fund, if such an arrangement is under the circumstances countermandable (*b*) ; nor, for the same reason, a direction to apply the fund where no consideration is proved (*c*). And the debtor's statement to the creditor that the arrival of a certain expected ship will put him in funds to adjust his account, or a direction in a bill of exchange to place it against a particular account, will be equally inoperative (*d*). Nor is an assignment created by giving an authority to a person without interest in the debt, to receive it, though he promise to pay it to the creditor of the person who gives the authority ; because such a transaction embraces neither a direction to the person who owes the money, nor a direct agreement between the debtor and the creditor (*e*). If, however, there is a sufficient indication that the supposed assignee is to have the benefit of the fund or chose in action in question, in addition to relying on the credit of the assignor, or, as it is sometimes put, is to be paid "out of the fund" as distinguished from "when the assignor gets the fund," a valid equitable assignment is created, provided that the transaction is for value. The intention must be that the property shall pass (*f*). A cheque is not an equitable assignment of the drawer's balance at his bankers, being in the nature of a bill of exchange (*g*).

Choses in
action
formerly not
assignable
at law
but *aliter* in
equity.

231. A chose in action was formerly not capable of being assigned at law without the express or implied consent of the holder of the fund to apply it to the purpose pointed out by the assignment, except in the case of assignment made valid by custom such as bills of exchange, or by statute (**149**). In equity, however, the assignee of what is termed a legal chose in action, that is to say, a thing recoverable in a court of law, could obtain an authority enabling him to sue at law in his assignor's name ; and the assignee of a chose in equity or equitable chose in action, that is to say, a thing recoverable in a court of equity only, could sue in the Court of Chancery in his own name, provided always that he had given notice to the holder (*h*). Such an assignment would stand, though the person who gives it become bankrupt, or die before it reaches the holder of the

(*b*) *Malcolm v. Scott*, 3 Hare, 39 ; *Field v. Megaw*, L. R. 4 C. P. 660 ; and see *Thomson v. Simpson*, L. R. 9 Eq. 497 ; L. R. 5 Ch. 659.

(*c*) *Exp. Hall, re Whitting*, 10 Ch. D. 615.

(*d*) *Jones v. Starkey*, 16 Jur. 510 ; *Exp. Carruthers, re Higginson*, 3 De G. & Sm. 570 ; *Robey v. Ollier*, L. R. 7 Ch. 695 ; *App. Phelps & Co. v. Comber*, *supra*.

(*e*) *Rodick v. Gandell*, 12 Beav. 325 ; 1 De G. M. & G. 763.

(*f*) *Gorringe v. Irwell India Rubber, etc., Works*, 34 Ch. D. 128 ; *Re Casey's Patents, Stewart v. Casey*, [1892] 1 Ch. 104 ; *Tailby v. Official Receiver*, 13 App. Cas., at p. 543.

(*g*) *Hopkinson v. Forster*, L. R. 19 Eq. 74.

(*h*) See White and Tudor's Leading Cases, 6th ed., vol. ii. p. 836.

goods, or can otherwise be acted on (*i*). It would also be good as between the assignor and assignee, without notice of it to the holder of the fund (*k*); though to prevent the debtor from afterwards paying the fund to the assignor it is proper that such notice should be given.

232. As all courts now take notice of equitable rights (*l*), and if there (*m*) be any conflict, the rules of equity prevail, the assignee can, after giving notice, whether written or not, sue the original debtor in his own name. The Judicature Act, however, contains an express provision, the object of which is to facilitate the remedy of the assignee in the case of a limited class of assignments (*n*). By that Act, any absolute assignment by writing under the hand of the assignor (*not purporting* to be by way of charge only) (**152**) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed) to transfer the legal right to such debt or chose in action from the date of such notice, and all remedies for the same, and the power to give a discharge without the concurrence of the assignor. Provided, that if the debtor trustee or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled to call upon the several claimants to interplead, or he may pay the same into the High Court of Justice under the provisions of the Acts for the relief of trustees (*o*).

233. A suggestion appears to have been made by *Kay, J.*, in one case (*p*) that no assignment of a legal chose in action can now be effected except in writing. In the Court of Appeal, however, no argument appears to have been put forward in support of that view which is, it is submitted, untenable. It is apprehended that there was no intention to alter the old law that an assignment of a debt could be effected by word of mouth.

(*i*) *Smith v. Everett*, 4 Bro. C. C. 63; *Exp. South, re Row*, 3 Swans. 392; *Burn v. Carvalho*, 4 Myl. & Cr. 690; *Gurnell v. Gardner*, 9 Jur. (N.S.) 1220; *Exp. Steward*, 3 Mont. D. & De G. 265; and was also under the statute: *Walker v. Bradford Old Bank*, 12 Q. B. D. 511; *Gorringe v. Irwell India Rubber, etc., Works*, 34 Ch. D. 128.

(*k*) *Rodick v. Gandell*, 1 De G. M. & G. 763; *per Lord TRURO*; see *Rayner v. Harford*, 27 L. J. Ch. 708; *Re Pryce, Exp. Rensburg*, 4 Ch. D. 685.

(*l*) Judicature Act, 1873, s. 24, sub-s. (4).

(*m*) *Ib.* s. 11.

(*n*) *Walker v. Bradford Old Bank*, *supra*.

(*o*) Judicature Act, 1873, c. 66, s. 25 (6); from Nov. 1st, 1875, Judicature (Commencement) Act, 1874, c. 83, s. 2; Irish Act, 1877 (40 & 41 Vict. c. 57), s. 28 (6).

(*p*) *Re Richardson, Shillito v. Hobson*, 30 Ch. D. 396.

Paragraphs
233—234

As, under this Act, an absolute assignment passes the property in the chose in action, it is not an hypothecation (215). If the assignment purport to be *by way of charge only* it will operate as heretofore; but if it purport to be absolute, the assignee may take advantage of the section in question, as the property will pass even although the assignment contains a proviso for redemption and re-assignment, *i.e.*, is in fact a mortgage (q) (152).

Debtor with
notice of
equitable
assignment
bound to pay
assignee.

234. When a debtor has received notice of an equitable assignment of the debt he is bound to pay it to the assignee, although the latter refuse to give him an indemnity; and it is no excuse for refusal and for payment to the assignor, that he has brought an action, to which the debtor has no legal defence; for the court will indemnify him by making the wrongful claimant pay the costs. And the fact that, after the assignment, the assignor has become bankrupt, or has made a composition with his creditors, makes no difference (r). But the holder of the property, even though he have accepted notice of the assignment, is not bound to deliver it to the assignee, unless the assignee's title be complete according to the law of the country where the property is situate (s).

SECTION III.

Of Maritime Hypothecations.

	PARAGRAPH
<i>Nature of bottomry</i>	235
<i>Bottomry how created</i>	236
<i>Form of bottomry bond</i>	237
<i>Bond executed before loan made</i>	238
<i>Bottomry bonds favoured by court and illegal provisions will be simply struck out</i>	239
<i>Maritime contracts construed by law of the ship's flag</i>	240
<i>Bottomry bond includes rigging and stores, and sometimes freight</i>	241
<i>Cargo is sometimes bound</i>	242
<i>Essentials of a bottomry bond</i>	243
<i>What advances can be secured by bottomry</i>	244
<i>What advances cannot be secured by bottomry</i>	245
<i>Ship must be the contemplated security, but no express agreement that the bond is to operate by way of bottomry is essential</i>	246
<i>Debtor to ship who makes loan on bottomry can only claim on the bond the balance over his debt</i>	247
<i>Loan must be risked on the ship</i>	248
<i>Intention to incur maritime risk may be implied</i>	249
<i>Implication from reservation of maritime interest</i>	250
<i>By whom a bottomry bond may be granted</i>	251

(q) *Tancred v. Delagoa Bay Co.*, 23 Q. B. D. 239; disapproving *National Provincial Bank of England v. Harle*, 6 Q. B. D. 626; and following *Burlinson v. Hall*, 12 Q. B. D. 347.

(r) *Hutchinson v. Heyworth*, 9 Ad. & El. 375; *Jones v. Farrell*, 1 De G. & J. 208; subject to the statutory provision as to conflicting claims, *supra*.

(s) *Sichell v. Raphael*, 10 Jur. (n.s.) 1165.

	PARAGRAPH	Paragraphs
<i>Conditions to the exercise of power by master of ship</i>	252	235—236
<i>Power to effect bottomry belongs to master for the time being</i>	253	
<i>Consent of owner must be obtained if practicable</i>	254	
<i>If cargo included, consent of owner of cargo must be obtained if practicable</i>	255	
<i>Master should advertise intention to raise money on bottomry</i>	256	
<i>For what purposes and in what ports master may execute a bottomry bond</i>	257	
<i>Bond valid whatever the number of voyages contemplated</i>	258	
<i>Bond may be valid even when made in fraud of mortgagee; and master may give second bond</i>	259	
<i>Master cannot make owner personally liable</i>	260	
<i>Master not personally liable unless by express agreement</i>	261	
<i>When ship's agent can lend on bottomry</i>	262	
<i>Precautions to be observed by lender</i>	263	
<i>Respondentia</i>	264	

235. Maritime hypothecation may be by way of bottomry or respondentia. Nature of bottomry.

Bottomry, or *bottomage*, is a security, some form of which has been used among maritime nations from remote antiquity, and by which, formerly, the keel or bottom of the ship as representing her entire fabric, rigging and stores (and now, more often, all these specifically, and sometimes the cargo), are made a security for the repayment of money advanced for the repairs of the ship, or for other purposes necessary for the safe prosecution of her voyage. It may be defined as the hypothecation of a ship by the master with or without its freight, or freight and cargo (*t*), as a security for the payment, in the event only of the safe arrival of the ship at her destination, of a debt contracted for the supply of necessaries for the preservation of the ship and the continuance of the voyage; the debt being lost in case of the non-arrival of the ship. It creates a debt (which is generally treated as only nominal) against the master, but none against the owner (*u*).

236. Bottomry is effected by a writing, commonly called a bottomry bond, signed by the maker, and which may also be under seal, and may be executed on land (*x*). It was always treated as a negotiable instrument in courts of equity, including the Court of Admiralty (*y*), but not at law; but, like other choses in action, it is now assignable at law where the assignment is under the hand of the assignor, and does not purport to be by way of charge only (*z*) (**231**). Bottomry, how created.

(*t*) *Lex Mercatoria*, 171; *The Atlas*, 2 Hag. Ad. 48; *Soares v. Rahn* (*The Prince of Saxe-Coburg*), 3 Moo. P. C. 1, per Dr. LUSHINGTON; *The Osmanli*, 3 W. Rob. 198; 7 N. of C. 322; *The Empusa*, 5 P. D. 6.

(*u*) *The Atlas*, *supra*; *The Emancipation*, 1 W. Rob. Ad. 124; *Stainbank v. Shepard*, 17 Jur. 1032; *The Jonathan Goodhue*, Swab. 524; per Dr. LUSHINGTON; *The Mary Ann*, L. R., 1 Ad. & E. 13.

(*x*) *Menetone v. Gibbons*, 3 T. R. 267.

(*y*) *The Rebecca*, 5 C. Rob. Ad. 102; *The William*, Swab. 346.

(*z*) *Judicature Act*, 1873, s. 25 (6).

Paragraphs
237—240

Form of
bottomry
bond.

237. No particular form is necessary (*a*) for the bottomry bond but there must be a maritime risk to be ascertained from the contents of the instrument (*b*). An instrument in the form of a bill of sale may operate by way of bottomry, if hypothecation were intended (*c*); but not if the intention were to affect a sale (*d*). A bill of exchange will not operate by way of bottomry, though it be given for money borrowed for the repairs of the ship, and refer to such repairs (*e*). It seems that an agreement for a bottomry bond may be enforced in the absence of a complete hypothecation, if money have been *bonâ fide* advanced for the necessity of the ship on the faith of the agreement (*f*).

Bond
executed
before loan.

238. A bottomry bond may be valid although its execution preceded the loan, if the lender pledged his credit for the payment of the money, and paid it in due time (*g*); and although its execution followed the loan, or even the commencement of the voyage, if the loan was made on an agreement for bottomry (*h*). And if originally valid, it is not affected by the agreement of the bondholder to purchase the ship (*i*). But if, by agreement, the time for payment be postponed, the contract, being no longer founded on the necessity of the ship, is only personal, and has no validity as a bottomry bond (*k*).

Bottomry
bonds
favoured by
courts.
Invalid
provisions
may be
struck out.

239. Bottomry bonds, for the benefit of shipowners and for the advantage of commerce, are greatly favoured in maritime courts; and where there is no suspicion of fraud, every fair presumption is to be made to support them. Such parts of them as are inconsistent with the rules of bottomry may also be rejected, without affecting the validity of the security (*l*). The Admiralty Division of the High Court exercises a jurisdiction *in rem* in respect of all such hypothecations as possess the essential requisites of bottomry, including all matters respecting freight.

Maritime
contracts
construed
by law of
ship's flag.

240. Questions which arise upon contracts of affreightment made with the masters or owners of foreign ships, or concerning the authority of masters of foreign ships with whom goods have

(*a*) *The Alexander*, 1 Dods. 278, per Lord STOWELL; *The Mary Ann*, L. R. 1 Ad. & E. 13; per Dr. LUSHINGTON; *The Cecilie*, 4 Asp. M. C. 78.

(*b*) Per Dr. LUSHINGTON, *The Mary Ann*, L. R. 1 Ad. & E. at p. 14.

(*c*) *Johnson v. Shippen*, 2 Lord Raym. 982; 1 Salk. 35.

(*d*) *Ridgway v. Roberts*, 4 Hare, 106.

(*e*) *The Eenrom*, 2 C. Rob. 1; *Exp. Halkett*, 3 Ves. & B. 135; 19 Ves. 474.

(*f*) *The Alexander*, 1 Dods. 278; see *The Aline*, 1 W. Rob. 111.

(*g*) *The Royal Arch*, Swab. 269.

(*h*) *The La Ysabel*, 1 Dods. 273; *The Vibilia*, 1 W. Rob. 1; *The Trident*, 1 W. Rob. 29.

(*i*) *The Helgoland*, Swab. 491.

(*k*) *The Royal Arch*, *supra*.

(*l*) *The Augusta*, 1 Dods. 283; *The Osmanli*, 3 W. Rob. 198; *Smith v. Gould* (*Prince George*), 4 Moo. P. C. 21, per Lord CAMPBELL.

been shipped, are determined, in the absence of a stipulation to the contrary, by the law of the ship's flag, even though the contract be made in England; and not by the general law maritime as administered in England (*m*).

241. The hypothecation by way of bottomry of the keel or bottom of the ship, operates upon the whole ship with its rigging and stores, including such as may have been temporarily detached for safe custody (*n*). If the ship only be hypothecated without mention of the freight, the freight will not be liable to the bondholder (*o*). But if the ship and cargo, or the ship, cargo and freight, be hypothecated, the freight in the one case, and the ship and freight in the other, will still be liable before the cargo can be applied in discharge of the bond (*p*).

Paragraphs
240—241

Bottomry
bond includes
rigging and
stores, and
sometimes
freight.

Freight earned from sub-shippers of cargo, with the consent of the charterers, is liable, as against them, to a bottomry bond granted to secure advances made after the date of the charterparty (*q*).

Freight earned on a voyage subsequent to that for which the bottomry bond was granted, may be made liable to the bond, if the freight earned on the particular voyage has been received by the shipowner without the consent of the bondholder (*r*).

Freight which has been properly paid before the granting of the bottomry bond, or in pursuance of a previous charterparty after the date of the bond, and before the liability to pay it has been intercepted by proceedings on the bond; and insurance premiums on freight, to the deduction of which the shipowner is liable under the charterparty, will not be liable to the bottomry bond (*s*).

An advance of freight by a charterer to the master for necessary expenses, under a charterparty made after a bottomry bond, will be good, in the absence of fraud, as against the bondholder, whose security might have been postponed to a later bond made for the same purpose (*t*); but the bondholder has a claim for such freight against the owner (*u*).

And if ship and freight be lost, a bond upon the freight will give the holder a right to a proportionate share of the fund paid by the

(*m*) *The Gaetano and Maria*, 7 P. D. 137, notwithstanding *Duranty v. Hart (The Hamburg)*, Br. & L. 253; 2 Moo. P. C. (N.S.) 289; and see *Lloyd v. Guibert*, L. R. 1 Q. B. 115, judgment of WILLES, J.; and see *The Karnak*, L. R. 2 P. C. 505.

(*n*) *The Atlas*, 2 Hag. Ad. 48; *The Alexander*, 1 Dodds. 278.

(*o*) *The Mary Ann*, 4 N. of C. 376.

(*p*) *The Prince Regent*, Cit. 2 W. Rob. 83; *The Gratitude*, 3 C. Rob. 240, per Lord STOWELL.

(*q*) *The Eliza*, 3 Hag. Ad. 87.

(*r*) *The Jacob*, 4 C. Rob. 245; *Smith v. Bank of New South Wales*, L. R. 4 P. C. 194.

(*s*) *The John*, 3 W. Rob. 179; 7 N. of C. 61; *The Standard*, Swab. 267; *The Catherine*, Swab. 263.

(*t*) *The Cynthia*, 16 Jur. 749.

(*u*) *Id.*, per Dr. LUSHINGTON.

Paragraphs owner of the ship which caused the loss, in discharge of his liability
 241—243 for freight (x).

Cargo
 sometimes
 bound.

242. The cargo may be bound with the ship and freight, to secure advances for the necessities of the ship and the preservation and conveyance of the cargo (y). But if the bond be limited in terms to the ship, it will not affect the cargo (z), and the cargo cannot be bound by bottomry without the ship and freight, the proceeds of which must first be applied in discharge of the bond (a). But it seems that a bond which purports to affect the cargo only may be valid on the assumption that hypothecation of the ship and freight also was intended (b).

The master is not the agent for the cargo, except by contract or necessity, and he cannot hypothecate it until it is on board ship and under his control ; so that a bond made before that event upon ship, freight, and cargo, is void as to the cargo. The right is founded upon the necessity of the cargo (c), which is measured by the degree of danger and the extent of the advances required (d), as compared with the sufficiency of the ship and freight alone to bear such advances (e).

The master is not bound to tranship the cargo before raising money on bottomry, although it is in his discretion to do so (f).

Essentials of
 a bottomry
 bond.

243. It is essential to a bottomry bond,—

- (1) That the object of the loan or credit was the obtaining repairs or supplies necessary for the preservation of the ship and cargo, and the prosecution of the voyage (g).
- (2) That the ship was the contemplated security for the loan or credit (h).
- (3) That the maker of the bond had no other credit or means of obtaining the necessary supplies (i).
- (4) That the security of the loan or credit be dependent upon a maritime risk to be ascertained from the contents of the instrument (k).

(x) *The Empusa*, 5 P. D. 6.

(y) *The Gratitude*, 3 C. Rob. 240 ; *Duncan v. Benson*, 1 Ex. 537.

(z) *The La Constancia*, 2 W. Rob. 404 ; 4 N. of C. 285, 512.

(a) *The La Constancia*, *supra* ; *The Bonaparte*, *Wilkinson v. Wilson*, 3 W. Rob. 298 ; 8 Moo. P. C. 459.

(b) *The La Constancia*, *supra*.

(c) *The Jonathan Goodhue*, Swab. 355.

(d) *The Lord Cochrane*, 2 W. Rob. 320, *per* Dr. LUSHINGTON.

(e) *The Gratitude*, 3 C. Rob. 240 ; *Duncan v. Benson*, 1 Ex. 537.

(f) *The Lord Cochrane*, 8 Jur. 714 ; 2 W. Rob. 320.

(g) *Soares v. Rahn* (*The Prince of Saxe-Coburg*), 3 Moo. P. C. 1 ; *Gore v. Gardiner* (*The Hersey*), 3 Hag. Ad. 404 ; 3 Moo. P. C. 79. See *The Pontinda*, 9 P. D. 177. *Bona fides* will not avail the lender unless the things are *de facto* necessities.

(h) *The Augusta*, 1 Dods. 283 ; *The Wave*, 15 Jur. 518.

(i) *The Nelson*, 1 Hag. Ad. 169, *per* Lord STOWELL ; *Gore v. Gardiner* (*The Hersey*), *supra* ; *The Dunvegan Castle*, 3 Hag. Ad. 331.

(k) *The Atlas*, 2 Hag. Ad. 48 ; *The Royal Arch*, Swab. 269.

- (5) That the maker of the bond (if the master) could not under the circumstances communicate with the owner (*l*). Paragraphs
243—245

244. Advances for the following purposes may be secured by bottomry, viz. :— What
advances can
be secured
by bottomry.

Repairs, provisions, and other supplies to the ship; and all charges in respect of the ship and crew, which must be paid in order that she may prosecute her voyage, and for which the owner or master are liable; including port dues and lights, and the unloading of the outward cargo (*m*);

Sea stores for the subsistence of passengers paying passage money in the nature of freight (*n*);

Liabilities incurred through extraordinary peril or misfortune: such as salvage; the investigation at a foreign port of a mutiny, and replacing the master in command; dues and charges of a foreign government incurred while the master was out of possession, and paid, though without his authority, to release the ship; the services of a British consul in taking possession of and managing the affairs of the ship when unprotected (*o*).

The discharge of a prior bottomry bond on the same ship, and for the same voyage (*p*).

The court will not consider whether, in the refitting of a ship for sea, a little more or less has been done; especially if an improvement necessary for the intended voyage has been sanctioned by the owner (*q*); nor look too narrowly into charges for commission and agency included in the bond (*r*).

245. Advances for the following purposes may not be secured by bottomry :— What
advances
cannot be
secured by
bottomry.

The discharge of bottomry or other debts incurred in respect of the same ship on a former voyage (*s*);

Supplies for other ships, though belonging to the same owner (*t*);

Damage sustained by the outward cargo, unless (it seems) it be shown that the consignee had a specific lien on the ship, in respect of which she might have been arrested (*u*);

(*l*) *The Olivier*, Lush. 484; *The Oriental*, 7 Moo. P. C. 398; *The Bonaparte*, *Wilkinson v. Wilson*, 8 Moo. P. C. 459; *The Karnak*, L. R. 2 P. C. 505.

(*m*) *Smith v. Gould (The Prince George)*, 4 Moo. P. C. 21; *The Edmond*, Lush. 57, 211; 30 L. J. Ad. 128.

(*n*) *The Duke of Bedford*, 2 Hag. Ad. 294.

(*o*) *The Gauntlet*, 3 W. Rob. 82; 6 N. of C. 370; *The Zodiac*, 1 Hag. Ad. 320. *Parmeter v. Todhunter*, 1 Camp. 541, per Lord ELLENBOROUGH.

(*p*) *The Toivo*, 1 Sp. 185; *Dobson v. Lyall*, 8 Jur. 969.

(*q*) *The Royal Arch*, Swab. 269.

(*r*) *The Calypso*, 3 Hag. Ad. 162.

(*s*) *The Lochiel*, 2 W. Rob. 34; *The Osmanli*, 3 W. Rob. 198; 7 N. of C. 322; *The Toivo*, 1 Sp. 185, per Dr. LUSHINGTON; *Dobson v. Lyall*, *supra*.

(*t*) *The Osmanli*, *supra*.

(*u*) *Smith v. Gould (The Prince George)*, 4 Moo. P. C. 21, per Lord CAMPBELL; *The Edmond*, Lush. 57.

Paragraphs
245—246

And generally, liabilities which do not form liens upon, although they were incurred in respect of, the ship : For example,—claims for adjusting general average contribution from the ship ; premiums for insurance of ship and freight, or of advance on bottomry ; wages paid in advance to the crew in a foreign port ; expenses of re-landing goods of lender shipped in an unsafe condition ; the private debt of the master ; debts on the ship bought up by the lender ; unliquidated claims on accounts between the parties (x).

Ship must have been the contemplated security, but no express agreement for bottomry required.

246. So far as the loan or any part of it was lent upon personal credit, or to pay for work already done without any stipulation for bottomry, the security will not take effect by way of bottomry, in favour of the person who made the advance (y). But a bond for securing money lent for the discharge of debts previously incurred upon personal credit for necessities may be given to a person who did not supply the necessities (z).

If the loan was not made on personal credit, and it can be inferred from the circumstances that the lender looked to the security of the ship, the security may take effect by way of bottomry, though the advance was made, or the responsibility incurred, without an express agreement for bottomry (a).

If the loan was clearly made upon personal credit, the right of the lender to a lien upon the ship by the law of the country in which the bond was granted, or even the arrest or threatened arrest of the ship or the master, will not alone give validity to a subsequent bottomry bond for the same debt, but ought to be considered in combination with other circumstances in judging of the validity of the bond ; and if there be no proof that the loan was made upon personal credit, the presumption that it was made upon the credit of the ship is favoured by the existence of a lien (b).

If it be proved that the foreign law gave a lien upon the ship for damage to the cargo in the voyage in which the ship was then engaged, or for any other demand for which the owner would be liable, and that the master had no fund from which it could be

(x) *The North Star*, Lush. 45 ; *The Serafina*, Br. & L. 277 ; *The Boddingtons*, 2 Hag. Ad. 422 ; *The Royal Stuart*, 2 Sp. 258 ; *Yates v. Hall*, 1 T. R. 73, per BULLER, J. ; *The Ocean*, 2 W. Rob. 429 ; 4 N. of C. 410 ; *The Cognac*, 2 Hag. Ad. 385 ; *The Ida*, L. R. 3 Ad. & E. 542.

(y) *The Augusta*, 1 Dods. 283 ; *Gore v. Gardiner (The Hersey)*, 3 Moo. P. C. 79 ; *Beldon v. Campbell*, 6 Ex. 886.

(z) *The Hebe*, 2 W. Rob. 412 ; 4 N. of C. 361 ; *The Karnak*, L. R. 2 Ad. & E. 289 ; L. R. 2 P. C. 505 ; 6 Moo. P. C. (N.S.) 136.

(a) *The Alexander*, 1 Dods. 278 ; *The Vibilia*, 1 W. Rob. 1 ; *The Laurel*, B. & L. 317.

(b) *The Augusta*, 1 Dods. 283 ; *The Vibilia*, 1 W. Rob. 1 ; *Gore v. Gardiner (The Hersey)*, 3 Hag. Ad. 404 ; 3 Moo. P. C. 79 ; *The Royal Arch*, Swab. 269 ; *The Laurel*, B. & L. 191, per Dr. LUSHINGTON ; *The Karnak*, L. R. 2 Ad. & E. 289 ; L. R. 2 P. C. 505 ; 6 Moo. P. C. (N.S.) 136.

made good, he may hypothecate the ship to prevent its arrest and sale (c). Paragraphs
246—248

If the general character of the transaction be clearly of the nature of bottomry, the whole will be presumed to be of the same character, unless the contrary be proved. And particular advances of small amount made for the necessary service of the ship, or for the payment of debts incurred for such service, before the bond was specially mentioned, may be included in the bond (d).

If the loan be made upon the sole security of the bottomry bond, the bond will not be invalid because bills of exchange for the amount due were given at the same time, even though it be stated that the bond was a collateral security for the bills (e).

Such bills are commonly given in practice, and though called collateral securities, they are only given as additional and more negotiable securities, and do not affect the nature of the original bottomry transaction (f).

If the bill of exchange be given before the bottomry bond, or if it form the only written contract, it is evidence that no security was intended to be given upon the ship (g).

247. One who, being indebted to the ship or her owners, lends money on bottomry, can have the benefit of the security for so much only of the loan as exceeds his debt; because, to the extent of the debt, the borrower was not without resources (h). And if the master borrow on bottomry, without reckoning such resources as he may have at the port, or for purposes which may not, as well as for those which may, be supplied by bottomry, the amount properly chargeable on the bond will be ascertained by inquiry (i).

248. The bottomry bond is commonly made payable upon or within a short time after the arrival of the ship at her destination (k), and it must express or imply that the loan is risked upon the arrival of the ship (l).

The particular voyage upon which the risk is incurred ought to

(c) *Smith v. Gould (The Prince George)*, 4 Moo. P. C. at p. 31, per Lord CAMPBELL.

(d) *The Vibilia*, 1 W. Rob. 1; *The Trident*, 1 W. Rob. 29; *The Hebe*, 2 W. Rob. 412; 4 N. of C. 361; *Smith v. Gould (The Prince George)*, 4 Moo. P. C. 21.

(e) *The Tartar*, 1 Hag. Ad. 1; *The Nelson*, 1 Hag. Ad. 169; *The Jane*, 1 Dods. 461; *The Emancipation*, 1 W. Rob. 124.

(f) *The Nelson*, 1 Hag. Ad. 169, per Lord STOWELL; *The Ariadne*, 1 W. Rob. 411, per Dr. LUSHINGTON; *Smith v. Bank of New South Wales*, L. R. 4 P. C. 194.

(g) *The Augusta*, 1 Dods. 283; *Stainbank v. Shepard*, 17 Jur. 1032, per PARKE, B.; *Exp. Halkett*, 19 Ves. 474.

(h) *The Hebe*, 2 W. Rob. 146, 412.

(i) *Dobson v. Lyall*, 2 Ph. 323, n.; *The Heart of Oak*, 1 W. Rob. 234; *Smith v. Gould (The Prince George)*, 4 Moo. P. C. 21.

(k) *The Duke of Bedford*, 2 Hag. Ad. 294; *The North Star*, Lush. 45. If the holder of the bond arrest the ship before the bond is due, and the money was ready, he must pay the costs of the arrest. *The Endora*, 48 L. J. Ad. 32.

(l) *The Nelson*, 1 Hag. Ad. 169; *The Atlas*, 2 Hag. Ad. 48; *Stainbank v. Fenning*, 11 C. B. 51; 15 Jur. 1082; *Stainbank v. Shepard*, 13 C. B. 418; 17 Jur. 1032; *The Mary Ann*, L. R. 1 Ad. & E. 13, per Dr. LUSHINGTON; *Smith v. Bank of New South Wales*, L. R. 4 P. C. 194.

Paragraphs
248—250

be stated in the bond as precisely as circumstances will admit ; and the bond will not be discharged if the voyage be abandoned (*m*), or by a loss happening in the course of an unnecessary deviation (*n*). But it will not be invalid for want of an exact description of the voyage, if, as in the case of a government transport, the voyage be not under the control of the person who grants the bond (*o*).

The words “ port or destination ” include any port at which the voyage may be ended, although it be by the voluntary act of the master, if he acted properly in ending it (*p*).

Intention to
incur
maritime risk
may be
implied.

249. An intention to incur maritime risk may be implied :—

By a provision that the money shall be paid at such a time after the arrival of the ship at her port (*q*) ; or “ after my arrival ” (meaning, with the ship) (*r*) ; or by the use of the word bottomry (*s*).

But not by the use of the word “ hypothecate ” ; or by the reservation of a rate of interest not exceeding the current rate at the place in which the loan was made (*t*).

If the lender take upon himself the risk of part only of the voyage, and the voyage be divisible, the loan may be held to have been made upon that part only of the voyage upon which the risk was taken (*u*).

Implication
from
reservation of
maritime
interest.

250. If maritime risk be apparent in the bond, it will be valid, although maritime interest or premium (which is given only as compensation for maritime risk) be not reserved (*x*). But where the character of the instrument is doubtful, it is a material circumstance that only ordinary interest was reserved (*y*).

If the amount of the maritime interest be not inserted in the bond, it will not be supplied by the court upon evidence that the rate agreed upon was omitted by mistake ; but the rate of interest usual at the time and place of the execution of the contract will be allowed, when it has been ascertained by the Registrar and merchants (*z*).

If the rate of maritime interest or premium reserved, be so exorbitant as to be contrary to good faith, it will be reduced to a reasonable rate (*a*) ; and interest at 4 per cent. only is allowed from

(*m*) *The Helgoland*, Swab. 491.

(*n*) *Harman v. Vanbatton*, 1 Eq. Ca. Abr. 371.

(*o*) *The Jane*, 1 Dods, 461.

(*p*) *The Great Pacific*, L. R. 2 Ad. & E. 381 ; L. R. 2 P. C. 516.

(*q*) *The Nelson*, 1 Hag. Ad. 169.

(*r*) *Simonds v. Hodgson*, 3 B. & Ad. 50.

(*s*) *The Royal Arch*, Swab. 269, per Dr. LUSHINGTON.

(*t*) *The Emancipation*, 1 W. Rob. 124.

(*u*) *The Hero*, 2 Dods, 139.

(*x*) *The Boddingtons*, 2 Hag. Ad. 422, per Sir C. ROBINSON ; *The Laurel*, B. & L. 317 ; *The Empusa*, 5 P. D. 6 ; *The Mary Ann*, L. R. 1 Ad. & E. 13 ; *The Heinrich Bjorn*, 5 Asp. M. C. 391.

(*y*) *The Emancipation*, 1 W. Rob. 124 ; *The Royal Arch*, Swab. 269.

(*z*) *The Change*, Swab. 240.

(*a*) *The Zodiac*, 1 Hag. Ad. 320 ; *The Cognac*, 2 Hag. Ad. 377 ; *The Royal Arch*, Swab., 269, per Dr. LUSHINGTON ; *The Huntley*, Lush. 24 ; *The Lord Cochrane*, 8 Jur. 714 ; *The Laurel*, 11 Jur. (N.S.) 46.

the time fixed for payment until actual payment, although higher interest during that time is reserved by the bond (*b*) ; and the court will not pronounce against the bond on account of the largeness of the premium or commissions, unless they are so large as to be fraudulent (*c*).

Paragraphs
250—253

If a substantial part only of the risk has been incurred, the whole maritime interest incurred may yet be allowed. But if no part of the risk has been incurred, relief will be given against the bond upon payment of the principal with ordinary interest (*d*).

251. A bottomry bond may be granted either by the owner (whether the master of the ship or not), or by the master (*e*). If the owner of a ship, who is also the master, grants a bottomry bond, he grants it as owner only ; the character of master being absorbed in the ownership (*f*) ; but if he be only part owner and master, he has no more power as against the other part owners than a mere master (*g*). The owner of a ship, who is not also the master, may grant a bottomry bond without the concurrence of the master (*h*), but he can only hypothecate for necessary supplies to the ship, and in a foreign port (*i*).

By whom a
bottomry
bond may be
granted.

252. The power of the master to raise money upon bottomry rests, both as to the ship and the cargo, upon the necessity of acting by an agent where no contract can be made by the owner ; and of obtaining supplies for the ship which cannot be had upon other terms, and it can be used only for the benefit of the ship and cargo (*k*). If the master execute a bottomry bond, being at the time under arrest at the suit of the lender, it will be valid as to advances received at the time of executing the bond ; and as to former advances, it will not be void by reason of the imprisonment of the master, unless it were given under absolute duress (*l*). But a bottomry bond cannot be supported on the mere ground that the master was arrested, or liable to arrest for the debt (*m*).

Conditions to
the exercise
of power by
master.

253. The master may grant a bottomry bond so long as he remains in the visible exercise of his command (*n*). And upon

Power
belongs to
master for the
time being.

(*b*) *The Sophia Cook*, 4 P. D. 30 ; 49 L. J. Ad. 16.

(*c*) *The Dante*, 2 W. Rob. 427 ; 4 N. of C. 408.

(*d*) *De Guilder v. Depeister*, 1 Vern. 263 ; *The Aline*, 1 W. Rob. 111, per Dr. LUSHINGTON ; *The Dante*, *supra*.

(*e*) *The Barbara*, 4 C. Rob. 1 ; *The Duke of Bedford*, 2 Hag. Ad. 294 ; *The Helgoland*, Swab. 491.

(*f*) *The Duke of Bedford*, *supra*, per Sir C. ROBINSON.

(*g*) *The Orelia*, 3 Hag. Ad. 75.

(*h*) *The Duke of Bedford*, *supra* ; *The Barbara*, *supra*.

(*i*) *The Royal Arch*, Swab. 269, per Dr. LUSHINGTON ; *The Helgoland*, Swab. 491.

(*k*) *Buxton v. Snee*, 1 Ves. Senr. 154, per Lord HARDWICKE ; *Hussey v. Christie*, 13 Ves. at p. 598, per Lord ELDON ; *Duranty v. Hart (The Hamburg)*, 2 Moo. P. C. (N.S.) 289. As to the meaning of the word "necessity" see *The Karnak*, L. R. 2 P. C. 505 ; 6 Moo. P. C. (N. S.) 136.

(*l*) *The Heart of Oak*, 1 W. Rob. 234.

(*m*) *Smith v. Gould (The Prince George)*, 4 Moo. P. C. 21.

(*n*) *The Jane*, 1 Dods. 461.

Paragraphs
253—255

the death, permanent absence, or incapacity of the original master, the power vests in the master who succeeds, or has been substituted to take charge of the ship (*o*).

The master by succession includes an inferior officer; one of the original crew remaining upon the recapture of a ship (*p*); the purser, factor, or other person who at the time represents the owner (*q*); the British consul, though he has appointed a new master, who (without objecting) has not executed the bond (*r*).

The master by substitution may be a master appointed by the British consul (*s*); or the agents or consignees of the ship or of the cargo where recognized by the owner, or perhaps, if not so recognized (*t*); and though the underwriters intervene in the appointment after notice of abandonment by the owner (*u*).

Consent of
owner must
be obtained
if practicable.

254. By the law maritime as administered in England, the master must obtain the consent of the owner before granting a bottomry bond upon the ship and freight, if it be reasonably practicable to communicate with him; but he is not bound to await an answer from the owner before engaging for a loan on bottomry, if, under the circumstances, the consequent delay would endanger the safety of the ship and cargo (*x*).

The duty of the master in making or omitting such communications to the owner depends upon the practicability of communication with him, and not upon the circumstance that they are not in the same country (*y*).

Notice must be given to the owner notwithstanding his alleged insolvency, unless the insolvency be judicially declared; in which case notice must be given to those who succeed to his property (*z*).

If cargo
included
consent of
owners of
cargo must
be obtained
if practicable.

255. If it be intended to include the cargo in the bottomry bond, the same general rule applies as to obtaining the consent of the owners, shippers, or consignees of the cargo (*a*). But the number of owners of the cargo, the position of the ship with regard to them,

(*o*) *The Zodiac*, 1 Hag. Ad. 320; *The Alexander*, 1 Dods. 278; *The Rubicon*, 3 Hag. Ad. 9.

(*p*) *Parmeter v. Todhunter*, 1 Camp. 541, per Lord ELLENBOROUGH.

(*q*) *Scarborough v. Lyrus*, Latch, 252, per DODDERIDGE, J.

(*r*) *The Cynthia*, 16 Jur. 749.

(*s*) *The Zodiac*, 1 Hag. Ad. 320.

(*t*) *The Wakefield*, cit. 3 Hag. Ad. 8; *The Alexander*, 1 Dods. 278, per Lord STOWELL.

(*u*) *The Kennersley Castle*, 3 Hag. Ad. 1.

(*x*) *The Oriental*, 7 Moo. P. C. 398; *The Royal Arch*, Swab. 269, per Dr. LUSHINGTON; *The Olivier*, Lush. 484; *The Bonaparte*, *Wilkinson v. Wilson*, 8 Moo. P. C. 459; *The Karnak*, L. R. 2 Ad. & E. at p. 298; *The Panama*, L. R. 3 P. C. 199; *The Onward*, L. R. 4 Ad. & E. 38; *Kleinwort v. The Cassa Marittima of Genoa*, 2 App. Cas. 156; and see *Australasian Steam Navigation Co. v. Morse*, L. R. 4 P. C. 222.

(*y*) *The Oriental*, 7 Moo. P. C. 398; *The La Ysabel*, 1 Dods. 273; *The Trident*, 1 W. Rob. 29; see *Johns v. Simons*, 2 Q. B. 425.

(*z*) *The Panama*, *supra*.

(*a*) *The Bonaparte*, *Wilkinson v. Wilson*, 8 Moo. P. C. 459; *The Olivier*, Lush. 484; *Duranty v. Hart (The Hamburg)*, Br. & L. 253; 2 Moo. P. C. (N.S.) 289; *The Onward*, L. R. 4 Ad. & E. 38; *Kleinwort v. The Cassa Marittima of Genoa*, 2 App. Cas. 156.

and to the means of communication, the perishable nature of the cargo and its relative value to that of the ship, are circumstances which must be considered in each case, and which prevent the laying down of any absolute rule upon the subject (*b*).

It is not necessary to give special notice of the intended bottomry to the shipper of the cargo, if being on the spot, and cognizant of the intended bottomry, he does not interfere (*c*).

But the rule as to communication depends, in cases relating to the authority of masters of foreign ships to bind the owners of the ship or cargo without communication, upon the law of the ship's flag (*d*).

The consent of the managing owner of the ship to the bottomry bond will bind his co-owners (*e*), and the consent of the principal owners of the cargo will bind the other owners (*f*).

256. It is proper, but not absolutely necessary, that the master, before raising money on bottomry, should advertise his intention to do so (*g*).

257. The master may, subject to the rule as to communication with the owner, grant a bottomry bond:—

In a foreign port for the completion of the voyage in which the ship is engaged (*h*); or for the return voyage (*i*).

For a new voyage from a foreign port with the consent of the owner, but not without such consent (*k*).

In a home port, if no communication can be had with the owner, for the completion of the voyage (*l*); but not, even with the consent of the owner, for a new voyage: lest a secret lien should be effected without necessity, and against the policy of the statute law, that all incumbrances should appear on the ship's papers (*m*).

In relation to the rights and remedies of persons having claims for repairs done to or supplies furnished to or for ships, every port

(*b*) *Duranty v. Hart* (*The Hamburg*), Br. & L. 253; 2 Moo. P. C. (N.S.) 289.

(*c*) *The Lord Cochrane*, 2 W. Rob. 320; 3 N. of C. 172; but see *The Nuova Loaneese*, 17 Jur. 263, *contra*.

(*d*) *The Gaetano Maria*, 7 P. D. 137; see *Lloyd v. Guibert*, L. R. 1 Q. B. 115.

(*e*) *The Royal Arch*, Swab. 269.

(*f*) *The Rhadamanthe*, 1 Dods. 201.

(*g*) *The Laurel*, B. & L. 317, *per* Dr. LUSHINGTON.

(*h*) See *The Vibilia*, 1 W. Rob. 1; *Lloyd v. Guibert*, L. R. 1 Q. B. 115.

(*i*) See *The Nelson*, 1 Hag. Ad. 169.

(*k*) *The Royal Arch*, Swab. 269, *per* Dr. LUSHINGTON; *Lister v. Baxter*, Str. 695.

(*l*) *The La Ysabel*, 1 Dods. 273; *The Trident*, 1 W. Rob. 29; *The Lochiel*, 2 W. Rob. 34; 2 N. of C. 177, *per* Dr. LUSHINGTON. "The master of a ship hath no power to take up money by bottommarie in places where his owner or owners dwell, unless it were for so much only as his part commeth unto in the said ship, otherwise his owne goods and not the ship is to answere the same."

"But when a master is out of his countrie, and where he hath no owners, nor any goods of their's, nor of his owne, and cannot finde means to take up by exchange or otherwise, and that for want of money the voyage might be overthrowen, then he may take money on bottommarie, and all the owners are liable thereunto, otherwise he shall bear the losse."—*Hanse Laws, Lex Mercatoria*.

(*m*) *Johnson v. Shippen*, 2 Ld. Raym. 982; *The Royal Arch*, Swab. 269; see *The Jenny*, 2 W. Rob. 5.

Master
should
advertise
intention
to
raise money
on bottomry.

For what
purposes and
where master
may give
bond.

Paragraphs
257—261

within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed a home port (*n*).

Bond valid
whatever the
number of
voyages con-
templated.

258. A bottomry bond may be valid whatever be the number of voyages included in the adventure, provided such voyages were in the contemplation (expressed or to be inferred) of the owner. Intermediate voyages, which under the circumstances the master is considered to be justified in making, will be treated as grafts upon the original enterprise (*o*). The bond will be enforced if the master fraudulently neglect or refuse to complete the voyage, or if the voyage having been begun remain incomplete from circumstances beyond the bondholder's control (*p*). A deviation from the voyage mentioned in the bond makes the amount of bond immediately payable unless the bondholder consented to such deviation (*q*).

Bond may be
valid even
when made
in fraud of
mortgagee,
and master
may give
second bond.

259. A bottomry bond will not be invalid by reason that the voyage was made in fraud of a mortgagee, or of the Merchant Shipping Act, 1894 (*r*), the lender being without notice (*o*). And, except in cases of fraud, the right of the master to make a second bottomry bond will not be interfered with, although the effect will be to injure the first bondholder (*s*).

Master
cannot make
owner
personally
liable to
lender.

260. The master cannot bind any owner of the ship or cargo other than himself to the lender on bottomry personally, but only to the extent of the property comprised in the bond; and the bond will be rejected, so far as it affects to bind the owner personally (*t*). But if the bond include the cargo, the shipowner, whether the cargo be made liable by the same or by different instruments, will be bound personally to refund to the owner of the cargo, so much as he may have been obliged to pay of the shipowner's debt, by reason of the insufficiency of the ship and freight; and the shipowner cannot relieve himself from this liability by abandoning the ship (*u*).

Master not
personally
liable unless
by express
words.

261. In the absence of express contract, the master is not personally liable on the bottomry bond. It is usual for the master to bind himself expressly; but his liability is commonly treated as nominal,

(*n*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 8. For Scotland, 19 & 20 Vict. c. 60, s. 18.

(*o*) *The Mary Ann*, 4 N. of C. 376; 10 Jur. 253. See *The Reliance*, 3 Hag. Ad. 66.

(*p*) *The Armadillo*, 1 W. Rob. 251; *The Dante*, 2 W. Rob. 427.

(*q*) *The London and Midland Bank v. Neilson*, 1 Mathews Comm. Cases, 18; *The Armadillo*, *supra*; *The Catherine*, 15 Jur. 231.

(*r*) *The Mary Ann*, L. R. 1 Ad. & E. 13.

(*s*) *The Armadillo*, 1 W. Rob. 251.

(*t*) *The Tartar*, 1 Hag. Ad. 1; *The Nelson*, 1 Hag. Ad. 169; *The Nostra Senora del Carmine*, 1 Sp. 303; 18 Jur. 730.

(*u*) *Benson v. Duncan*, 3 Ex. 644; *Duncan v. Benson*, 1 Ex. 537. In France it is said the shipowner may relieve himself from the consequences of the master's engagement by abandoning the ship and freight.

though it may be enforced, and in questions of priority is treated as a subsisting liability (x). Paragraphs
261—263

262. The agent or consignee of the ship or cargo cannot generally take a bottomry bond to secure disbursements which he has made as agent (y); but he may do so upon the failure or insufficiency of the credit upon which he relied, if he give prompt notice of the necessity under which the disbursements were made (z); and, whether he be the agent of the owner or of the mortgagee, he may lend on bottomry, if he give notice to the master of his refusal to lend upon personal credit (a). When ship
agent can
lend on
bottomry.

263. One who lends or makes himself responsible for money expended for the use of a ship, intending to require a bottomry bond, ought, if he has the opportunity, to give notice of his intention to the master or owner at the earliest possible period (b). Precautions
to be
observed by
lender.

He must also use reasonable diligence in ascertaining that the loan is necessary; that it can be obtained only by bottomry; and that such communications as under the circumstances are practicable, have been made to the owners and consignees of the ship and cargo (c).

The lender will not be discharged from the duty of making these enquiries by the circumstance that the master has sold the bottomry loan by auction to the lowest bidder, after advertising his intention to do so (d).

If the lender have made proper inquiries, the bottomry bond will be valid, though it be shown that the supplies were not necessary, or that they might have been had upon personal credit. But it will, of course, be void if he had notice from the owner's agent not to make the advance (e).

If the lender have made proper inquiries, and fraud be not shown, he will not be liable to see to the due application of the loan (f); but if he is agent it is his duty also to see to the due application of the loan (g).

(x) *The Jonathan Goodhue*, Swab. 524; *The Salacia*, Lush. 545.

(y) *The Gratitude*, 3 C. Rob. 240; *The Hero*, 2 Dods. 139, per Lord STOWELL; *The Minstrel Boy*, 7 N. of C. 341.

(z) *The Rubicon*, 3 Hag. Ad. 9; *The Hero*, supra, per Lord STOWELL.

(a) *The Vibilia*, 1 W. Rob. 1; *The Lord Cochrane*, 2 W. Rob. 320; 3 N. of C. 172; *The Hero*, supra; *The Royal Arch*, Swab. at p. 279, per Dr. LUSHINGTON; *Smith v. Bank of New South Wales*, L. R. 4 P. C. 194.

(b) *The Wave*, 15 Jur. 518.

(c) *The Orelia*, 3 Hag. Ad. 75; *The Roderick Dhu*, Swab. 177; *Heathorn v. Darling (The Eliza)*, 1 Moo. P. C. 5; *The Olivier*, Lush. 484.

(d) *Soares v. Rahn (The Prince of Saxe Coburg)*, 3 Hag. Ad. 387; 3 Moo. P. C. 1.

(e) *The Nelson*, 1 Hag. Ad. 169, per Lord STOWELL; *The Faithful*, 31 L. J. Ad. 81; *Soares v. Rahn (The Prince of Saxe Coburg)*, supra, per Dr. LUSHINGTON.

(f) *The Jane*, 1 Dods. 461, per Lord STOWELL; *The Roderick Dhu*, Swab. 177, per Dr. LUSHINGTON.

(g) *The Royal Stuart*, 2 Sp. 258, per Dr. LUSHINGTON. Compare the above rules with those laid down by the Privy Council, as to the rights, under the Hindoo law, of an incumbrancer who has taken from the manager of the estate of an infant heir a charge upon it created for the salvage or benefit of the estate. The lender is bound to inquire into the necessity for the loan, and to satisfy himself,

Paragraphs
263—264

The lender on bottomry, is not bound to judge as to the expediency of the proposed repairs to the ship, with reference to the value of the property, unless under the circumstances fraud can be imputed (*h*); or to communicate the existence of the bond to mortgagees of the ship; and he is not affected although the owners conceal it from the mortgagees (*i*). If the lender be the ship's agent, he must use greater vigilance than other persons can be expected to take. He should communicate to the owners of the ship that he cannot advance the money as agent, and must give the master an opportunity of trying to raise the money elsewhere (*k*).

Respon-
dentia.

264. Respondentia, is the separate hypothecation of the cargo of a ship as security for the repayment of a debt contracted about the necessary cost of transshipping and forwarding the cargo to its destination (*l*).

Respondentia, and bottomry, are founded upon the same necessity of borrowing money for the preservation of the property. They are alike subject to the rules respecting maritime risk and interest, and the rejection of void stipulations (*m*).

Notice should be given to the owners of the cargo before it is hypothecated on respondentia; but want of notice will not invalidate the bond if the owners are so numerous and remote, that the expense and hazard of keeping the cargo pending the communication, would probably be equivalent to its loss (*n*).

The effect of the contract depends upon the particular form of the instrument; and notwithstanding a recital that the loan was on the goods laden or to be laden on board the ship, the borrower only will be personally liable to answer the contract if it appears that the goods were such as, in the course of the adventure, must necessarily be sold or exchanged, or if the effect of the recital be restrained by the context (*o*).

as well as he can, with reference to the parties with whom he is dealing, that the manager is acting for the benefit of the estate. If he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and under such circumstances he is not bound to see to the application of the money. *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*, 6 Moo. I. App. 393.

(*h*) *The Vibilia*, 1 W. Rob. 1; *Duncan v. Benson*, 1 Ex. 537, per POLLOCK, C. B.

(*i*) *The Helgoland* Swab. 491; but see *The Panama*, L. R. 2 Ad. & E. 390.

(*k*) *The Oriental*, 3 W. Rob. 255, reversed on another point, 7 Moo. P. C. 398; *The Tartar*, 1 Hag. Ad. 1; *The Hero*, 2 Dods. at p. 144; *The Ariadne*, 1 W. Rob. 411; *Smith v. Bank of New South Wales*, L. R. 4 P. C. at p. 204.

(*l*) *The Atlas*, 2 Hag. Ad. 48, per Lord STOWELL; *Cargo ex Sultan*, Swab. 504. See *Cargo ex Galam*, B. & L. 167.

(*m*) *The Cognac*, 2 Hag. Ad. 377, per Sir C. ROBINSON; *Cargo ex Sultan*, Swab. 504, per Dr. LUSHINGTON.

(*n*) *Cargo ex Sultan*, *supra*; and see *Australasian Steam Navigation Co. v. Morse*, L. R. 4 P. C. 222; *The Karnak*, 2 L. R. Ad. & E. 289; L. R. 2 P. C. 505; *Klienwort v. The Cassa Marittima of Genoa*, 2 App. Cas. 156.

(*o*) 2 Steph. Blackst. 91, ed. 8; *Busk v. Fearon*, 4 East, 319. But the form of the bond, upon which this decision was made, is nearly the same as that stated by WESKETT to be the form used in London in 1781. (Digest of Law of Insurance, 60.)

CHAPTER X.

Chapter X.

Of Securities made under Statutory or other Powers.

	PARAGRAPHS
Section I.—Of Securities made under powers generally ..	265—274
„ II.—Of Securities made by Corporations, including Incorporated Companies	275—296
„ III.—Of Securities made by Building and Friendly Societies	297—298
„ IV.—Of Securities by Married Women	299—312
SUB-SECT. (1).—SECURITIES WHERE PROPERTY IS NOT “SEPARATE” EITHER BY SETTLEMENT OR STATUTE	300—305
„ (2).—SECURITIES ON PROPERTY SETTLED TO MARRIED WOMAN’S SEPARATE USE ..	306—309
„ (3).—SECURITIES ON SEPARATE PROPERTY UNDER MARRIED WOMEN’S PROPERTY ACTS, 1882 AND 1893	310—312
„ V.—Of Securities upon the Property of Infants ..	313—315
„ VI.—Of Securities upon the Property of Lunatics ..	316—320
„ VII.—Of Securities by Tenants for Life and other Limited Owners	321—349
SUB-SECT. (1).—UNDER SETTLED LAND ACTS	321—328
„ (2).—UNDER IMPROVEMENT OF LAND ACTS ..	329—341
„ (3).—UNDER COPYHOLD ACT, 1894	342—348
„ (4).—UNDER LAND TAX REDEMPTION ACTS ..	349
„ VIII.—Of Securities upon Ecclesiastical Benefices ..	350—358
„ IX.—Of Securities by Private Trustees, Executors, Trustees in Bankruptcy, and Charitable Trustees	359—379
„ X.—Of Securities by Agents	380—404
SUB-SECT. (1).—SECURITIES BY AGENTS GENERALLY ..	380—382
„ (2).—SECURITIES BY MERCANTILE AGENTS UNDER FACTORS ACT, 1889	383—397
„ (3).—SECURITIES BY BANKERS AND BROKERS ON CUSTOMERS’ DOCUMENTS	398—400
„ (4).—SECURITIES BY PARTNERS	401—404
„ XI.—Of Securities by buyers and sellers under Factors Act, 1889	405—407

Paragraphs
265—266

SECTION I.

Of Securities made under powers generally.

	PARAGRAPH
<i>Corporations and limited owners can only create mortgages if empowered to do so</i>	265
<i>General powers may be sufficiently wide to include the creation of securities</i>	266
<i>Donor of doubtful power may be stopped from disputing its exercise</i> ..	267
<i>Powers must be exercised subject to general restrictions and consistently with the objects for which power was given</i>	268
<i>Mortgage to secure debt originally contracted on improper security not necessarily void</i>	269
<i>Purchase from donee of power without notice of invalidity</i>	270
<i>Express power to mortgage part does not negative implied power to mortgage other part</i>	271
<i>Equity relieves against mistake in mode of creating security under a power</i>	272
<i>Incapacity of giver of security to create a debt avoids the security</i> ..	273
<i>Where security ultra vires there may, nevertheless, be a good equitable debt</i>	274

265. When a person is not the absolute owner of property, he can only create a security on it to last beyond his own beneficial interest (if any), under some power or authority conferred upon him, either by statute, or by the party beneficially entitled (under power of attorney), or by some will or settlement by which the property was and remains settled. Moreover, in the case of a corporation, unless the instrument by which it was founded, or some statute, either expressly or impliedly authorizes a mortgage, it cannot create one. The subject is obviously a wide one, and if adequately treated, would require a whole volume to itself, and it is therefore only possible in this place to give a sketch of the main points arising out of such cases (a).

266. A power by which it is intended to authorize the raising of money on mortgage, should expressly specify the intention. Nevertheless, a mortgage may be made under a general power (such as a power of attorney) the terms of which are sufficiently extensive ; as, for instance, by the agent of a shipowner, of the passage-money of passengers, under a power to mortgage the vessel, “ and generally to do all acts about the business and affairs which the owner could have done ” (b) ; and by the directors of a company, empowered “ to do all such things as could be done by the company without a

(a) For further information on such cases the reader is referred to Brice on *Ultra Vires*, Grant on Corporations, the various treatises on the Municipal Corporations Act and the County Councils, and Mr. Powell’s work on Powers.

(b) *Willis v. Palmer*, 6 Jur. (N.S.) 732 ; 7 C. B. (N.S.) 340 ; 29 L. J. C. P. 194. But see *Lewis v. Ramsdale*, 55 L. T. 179 ; 35 W. R. 8, where the general words which would by themselves have authorized a mortgage were held to be restricted by the particular purpose of the instrument (or power of attorney). And see also *Mostyn v. Lancaster*, 23 Ch. D. 583, where a power to lease was held to give a power to grant a lease by way of mortgage.

general meeting"; but a general power "to sell, assign and transfer" is not sufficient to authorize a mortgage (c). Paragraphs
266—268

267. The donor of a power of doubtful sufficiency may, however, by direction as to its exercise, preclude himself from disputing the validity of a security made under the power (d). The donor of a doubtful power may be estopped from disputing its exercise.

268. The power, even where explicit, must be exercised subject to the general terms of the instrument in which it is contained; so that a corporation having a general power by statute to mortgage their lands, cannot mortgage those which by the same Act they are bound to sell within a limited time. Nor, where a mortgage is made under a provision that all mortgages shall be on an equal footing, can an undue advantage be given to the creditor by a security upon other property belonging to the donees of the power (e). On similar principles, the power, whether special or general, must also be exercised only for purposes consistent with the objects of the trust or undertaking, for the furtherance of which it is given. Therefore, although a benefit building society, if duly empowered by its rules, may borrow (f) a limited (but not an unlimited (g)) amount on mortgage, for better carrying out the proper objects of the society, it cannot do so where, there being no express power, it appears, from the rules or otherwise, that borrowing would be inconsistent with its constitution or unnecessary for the purposes of its business (h); or where the money is raised for a purpose which is not a legitimate object of the society. And a loan applied to purposes beyond the power, has been disallowed, though it did not appear that the lender had notice of the intended mis-application; but the society in such a case, or its liquidator, cannot be relieved against the security without paying the debt (i). In like manner, the trustees of a chapel, empowered to raise a sum sufficient for the payment of all debts, have been restrained from mortgaging without necessity, and for a sum insufficient for that purpose (k). So a power in a marriage settlement, for the parents, with the consent of the trustees, to revoke the old and to declare new uses, cannot be

Powers must be exercised subject to general restrictions and consistently with the objects for which power was given.

(c) *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733; *De Bouchout v. Goldsmid*, 5 Ves. 211; *Jonmenjoy Coondoo v. Watson*, 9 App. Cas. 561.

(d) *Perry v. Holl*, 2 Giff. 138; 6 Jur. (N.S.) 661; 2 De G., F. & J. 38, and see *Davies v. Bolton & Co.*, (1894) 3 Ch. 678.

(e) *De Winton v. Mayor, etc., of Brecon*, 26 Beav. 533.

(f) *Laing v. Reed*, L. R. 5 Ch. 4; *Moye v. Sparrow*, 18 W. R. 400; *Re Victoria, etc., Building Society*, L. R. 9 Eq. 605; but see *Murray v. Scott*, 9 App. Cas. 519.

(g) *Re Guardian, etc., Building Soc.*, 23 Ch. D. 440.

(h) *Re National, etc., Building Soc., Exp. Williamson*, L. R. 5 Ch. 309; *Blackburn Building Soc. v. Cunliffe Brooks & Co.*, 22 Ch. D. 61; *Baroness Wenlock v. River Dee Co.*, 19 Q. B. D. 155.

(i) *Re Kent Benefit Building Society*, 7 Jur. (N.S.) 1045; *Re Durham County Land and Building Society*, L. R. 12 Eq. 516; *Re Patent File Co., Exp. Birmingham Banking Co.*, L. R. 6 Ch. at p. 87, per JAMES, L.J.

(k) *Rigall v. Foster*, 18 Jur. 39.

Paragraphs
268—272

exercised for the purpose of mortgaging the estate for the benefit of the father, and to the prejudice of the children entitled under the trusts (*l*).

Mortgage to
secure debt
originally
contracted
on improper
security not
necessarily
void.

269. The mortgage, however, is not invalid only because it is made to secure a debt originally contracted on an improper security ; so it be clear that the mortgage is to secure the money, and not to support the invalid transaction. And a security made in excess of a power, but by which the estate passes, will be treated as valid in a foreclosure suit, and must be set aside, if at all, by an independent proceeding (*m*).

Purchase
without
notice of
invalidity.

270. A mortgage purporting to be executed according to, but which is in contravention of, statutory powers, will be good by estoppel in favour of a purchaser for value *without notice* of the infirmity (*n*).

Express
power to
mortgage
part does not
negative
implied
power to
mortgage -
other part.

271. A power to mortgage *in a certain manner*, is not inconsistent with the existence of a general right to mortgage property vested in the donees of the power, if they are not prohibited from so doing, and if they hold the property in a capacity, and mortgage it for purposes which do not affect the exercise or the objects of the power. Hence a mortgage by trustees of a public company of the plant, tools, and machinery used in the construction of their works is not *ultra vires*, although they were empowered by statute to mortgage in their corporate capacity *the rates and tolls* granted by the Act ; and the directors of a company who have power to *borrow* on mortgage to a certain amount, may mortgage the property of the company by debentures or deposit of deeds to secure a past debt (*o*) ; or to secure payment of purchase money (*p*).

Equity will
relieve
against
mistake in
mode of
creating
security.

272. Upon the principle that in equity whatever is agreed to be done, is done, effect will be given to an intention to create a security where the maker is of capacity to contract the debt, notwithstanding any mistake in the manner of doing it (*q*) ; or that it was done informally :—as, where a company empowered to raise money by debentures gave them to a contractor for the cost of work done,

(*l*) *Eland v. Baker*, 29 Beav. 137.

(*m*) *Scott v. Colburn*, 26 Beav. 276 ; 5 Jur. (N.S.) 183.

(*n*) *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642 ; *Re Romford Canal Co.*, 24 Ch. D. 85.

(*o*) *McCormick v. Parry*, 21 L. J. Ex. 143 ; 7 Ex. 355 ; *Re Patent File Co., Exp. Birmingham Banking Co.*, L. R. 6 Ch. 83 ; *Imperial Mercantile, etc., Association v. London, Chatham & Dover Rail. Co.*, 15 W. R. 1187 ; *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82 ; and the security may be made to the bankers of the company, as they are not officers of the company upon whom it is incumbent to see that all the proper formalities have been complied with. *Re General Provident Assurance Co., Exp. National Bank*, L. R. 14 Eq. 507.

(*p*) *Seligman v. Prince & Co.* (1895), 2 Ch. 617.

(*q*) *Re Strand Music Hall Co.*, 13 L. T. (N.S.) 177 ; 3 De G. J. & S. 147 ; followed *Re Queensland Land & Coal Co., Davis v. Martin*, [1894] 3 Ch. 181, where debentures were issued in blank.

instead of issuing them to him for money, and then handing him back the amount (*r*). Paragraphs
272—274

273. But if the maker of the security be not of capacity to contract the debt,—as if borrowing be expressly forbidden, or be authorized only subject to the performance of certain conditions, which have not been performed, or within a certain limit which has been exceeded,—no debt will arise at law (*s*). Incapacity of
maker to
contract the
debt avoids
the security.

274. Money borrowed or contracted to be paid irregularly on behalf, but shown to have been *bonâ fide* applied for the use, of a corporation, may, however, be treated as an equitable debt bearing interest. The principle is that as the money was applied in payment of recoverable debts, no addition is made to the liabilities of the corporation, and the lender should stand by subrogation in the place of the creditor who was paid (*t*). But in the absence of evidence, which must be adduced by the lender, that the money was so applied, the advance will not be recognized (*u*). And so if a trustee improperly raise money by mortgage, although the security will be void against a mortgagee with notice, he may nevertheless be a creditor (*x*) on the proceeds of the estate to the extent to which the money lent was properly applied in administration. Even where
security
ultra vires
it may give
rise to an
equitable
debt.

(*r*) *Re South Essex Gaslight Co., Hulett's Case*, 2 Johns. & H. 306; and see *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. at p. 654, per BLACKBURN, J.

(*s*) *Chambers v. Manchester & Milford Rail. Co.*, 10 Jur. (N.S.) 700; *Land-owners, etc., Drainage and Inclosure Co. v. Ashford*, 16 Ch. D. 411; *Re Pooley Hall Colliery Co.*, 18 W. R. 201; *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696; and *Firbank v. Humphreys*, 18 Q. B. D. 54, where borrowing powers were exhausted. In such cases the directors may be personally liable to the mortgagee on their implied representation that they had authority. And see also *South Yorkshire Rail. Co. v. G. N. R. Co.*, 9 Ex. 55 (Lloyd's Bonds); and as to how far corporations may be bound by *ultra vires*, see *Mayor of Norwich v. Norfolk Rail. Co.*, 4 El. & Bl. 397, 413; and *Bateman v. Mayor of Ashton*, 3 H. & N. 323.

(*t*) *Re German Mining Co.*, 4 De G. M. & G. 19; *Re Norwich Yarn Co.*, 22 Beav. 143; *Troup's case*, *Re Electric Telegraph Co. of Ireland*, 29 Beav. 353; *Hoare's case*, 30 Beav. 225; *Re Beulah Park Estate*, L. R. 15 Eq. 43; *Re International Life Assurance Co., Gibbs' and West's Case*, L. R. 10 Eq. 312; and see *Prince of Wales Assurance Co. v. Harding*, El. Bl. & El. 183; and *Re Magdalena Steam Navigation Co.*, Johns 690, which turned on the acquiescence of the shareholders; and see *Ernest v. Nicholls*, 6 H. L. C. 401; *Re Cork and Youghal Rail. Co.*, L. R. 4 Ch. 748; *Blackburn Building Society v. Cunliffe Brooks & Co.*, 22 Ch. D. 61; affirmed 9 App. Cas. 857 (sub nom. *Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society*); *Re Lough Neagh Ship Co., Exp. Workman* (1895), 1 Ir. Reps. 523. But distinguish *Re Wrexham Mold and Connah's Quay Rail. Co.*, [1899] 1 Ch. 440, where the loan was applied in payment of debts not recoverable.

(*u*) *Re National Permanent Benefit Building Society, Exp. Williamson*, L. R. 5 Ch. 309. An inquiry will be directed if the proper application of part be proved or admitted. *Blackburn Building Society v. Cunliffe Brooks & Co.*, *supra*.

(*x*) *Devaynes v. Robinson*, 24 Beav. 86; 3 Jur. (N.S.) 707.

Paragraph
275

SECTION II.

Of Securities by Corporations, including Incorporated Companies.

	PARAGRAPH
<i>Ordinary trading corporations have implied power to mortgage, but aliter as to railway, canal and gas companies, etc., and non-trading corporations</i>	275
<i>Statutory powers of railway, etc., companies to borrow on mortgage</i> ..	276
<i>Penalty for unauthorized mortgages by railway companies</i>	277
<i>Power of such companies to raise money on debenture stock</i>	278
<i>Priority of such stock and interest thereon, and appointment of receiver</i> ..	279
<i>Rights of prior mortgagees preserved</i>	280
<i>Application of money raised by railway, etc., companies</i>	281
<i>Separate accounts of such stock to be kept by companies</i>	282
<i>Railway Companies Securities Act, 1866</i>	283
<i>Registration of the securities of limited companies</i>	284
<i>Where prohibited from borrowing, companies may sometimes attain object by selling and hiring back the goods sold</i>	285
<i>Power to borrow and mortgage authorizes a mortgage to indemnify a surety</i>	286
<i>Power of directors to charge uncalled capital</i>	287
<i>Power to mortgage unissued shares</i>	288
<i>Power to mortgage future book debts</i>	289
<i>How far mortgagee bound to see that company has power to create his security</i>	290
<i>How far mortgagee bound to see that directors are qualified</i>	291
<i>Mere overdraft at bankers not equivalent to borrowing</i>	292
<i>Powers of municipal corporations to borrow on mortgage</i>	293
<i>Powers of county councils to borrow on mortgage</i>	294
<i>Powers of district and parish councils to borrow on mortgage</i>	295
<i>Powers of commissioners to borrow on mortgage</i>	296

Ordinary trading corporations have general power to borrow, but *aliter* as to railway, canal companies, etc., and non-trading corporations.

275. An ordinary trading or financial corporation, not incorporated for carrying out *quasi* public works (such as railways, docks, canals, and the like), may, it would seem, borrow money for the purposes of its undertaking, unless positively prohibited (*y*); and may mortgage its property for the purpose of securing the moneys borrowed (*z*). But semi-public corporations (such as railway, canal, dock and gas companies), and non-commercial corporations, can borrow only if and when they are expressly authorized to do so (*a*). A power to semi-public corporations (as has been already pointed out (174)), or non-commercial corporations, to mortgage, does not enable them to mortgage their lands, plant, etc., so as to give the mortgagees the right to enter upon the property, or otherwise interfere with the user and possession of the same by the corporation (*b*); nor can a corporation mortgage its franchises (*c*).

(*y*) *General Auction Co. v. Smith*, [1891] 3 Ch. 432; *Bryon v. Metropolitan, etc., Omnibus Co.*, 3 De G. & J. 123; *Re Marine Mansions Co.*, L. R. 4 Eq. 601.

(*z*) *Re Patent File Co., Exp. Birmingham Banking Co.*, L. R. 6 Ch. 83; *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. 156; *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733; *Bryon v. Metropolitan, etc., Omnibus Co.*, *supra*.

(*a*) Brice on *Ultra Vires*, 3rd ed., 222.

(*b*) Brice on *Ultra Vires*, 3rd ed., 238; *Gardner v. London, Chatham & Dover Rail. Co.*, L. R. 2 Ch. 201. See *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169; *Reeve v. Medway (Upper) Navigation Co.*, 21 T. L. R. 400.

(*c*) Brice on *Ultra Vires*, 3rd ed., 223.

276. Railway, dock, harbour and gas companies, and other companies formed for purposes of a semi-public character, are usually incorporated by special Act of Parliament, which almost invariably incorporates a general Act called the Companies Clauses Consolidation Act, 1845. By this Act, joint stock companies authorized by their special Acts to borrow money on mortgage or bond may (8 & 9 Vict. c. 16, s. 38), subject to the restrictions contained in the special Act, borrow such sums as shall from time to time by an order of a general meeting of the company be authorized to be borrowed, not exceeding in the whole the sum prescribed by the special Act, and may secure the repayment with interest, by a mortgage of the undertaking and the future calls on the shareholders, or by bonds (but not so as to preclude the application of the calls to the purposes of the company (s. 43) without express provision). And on discharge of any part of the money borrowed, may (s. 39) again, from time to time, borrow the amount paid off, upon obtaining the authority of a general meeting of the company in cases where the money is not re-borrowed in order to pay off any existing mortgage or bond.

Paragraphs
276—277

Power of
railway, etc.,
companies
to borrow on
mortgage.

The Act restrains the borrowing powers until the production of evidence that a definite part of the capital has been subscribed or paid up (s. 40) (*d*), and provides for the form of the mortgage or bond (s. 41) and for the priorities of the mortgagees or bondholders (ss. 42, 44) (*e*); for the registration of their securities (s. 45), and the form and registration and effect of transfers (s. 46, 47); for the payment and transfer of interest (ss. 48, 49); the repayment of principal and interest (ss. 50, 51); the cesser of interest (s. 52); the appointment of a receiver (ss. 53, 54); and the inspection of accounts (s. 55).

277. By another statute (*f*), which recited that many railway companies had borrowed money in an authorized manner, upon the security of loan notes, or other instruments purporting to give a security for repayment of principal sums borrowed at certain dates, and for payment of interest thereon in the meantime, a penalty was enacted equal to the amount purporting to be secured by any loan note or other negotiable or assignable instrument, thenceforth issued by any railway company, purporting to bind the company as a legal security for money advanced to them, otherwise than under the provisions of an Act or Acts of Parliament, authorizing the company to raise such money and to issue such security.

Penalty for
unauthorized
mortgages by
railway
companies.

(*d*) See *Fountaine v. Carmarthen Rail. Co.*, L. R. 5 Eq. 316.

(*e*) See *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. at p. 125. Sections 41 and 42 are only directory, and do not avoid a mortgage for want of an express statement of the sum advanced, if it be ascertainable. *Landowners, etc., Drainage & Inclosure Co. v. Ashford*, 16 Ch. D. 411.

(*f*) 7 & 8 Vict. c. 85, s. 19.

Paragraphs
277—283

By this Act the borrowing of money by railway companies otherwise than in conformity with the terms of their special Act is impliedly forbidden (*g*).

Power to
raise money
on debenture
stock.

278. By the Companies Clauses Acts, 1863 and 1869 (*h*), companies which, by any subsequent Act, are authorized to create and issue debenture stock, or which have power to raise money on mortgage or bond by any Act of Parliament, but no power to create and issue debenture stock, are enabled to raise by means of debenture stock at a fixed and preferential interest payable as the company thinks fit, all or any part of the money which they are authorized to raise by mortgage or bond, but the issue must be authorized by the company according to s. 22 of the Companies Act, 1863.

Priority of
stock.

279. The Act of 1863 makes the stock a charge on the undertaking prior to all shares or stock of the company, and transmissible and transferable like other stock, with the incidents of personal estate (s. 23). It gives the interest priority over dividends or interest on any stock or shares of the company, and next to the interest on mortgages or bonds granted before the creation of the stock; but the holders have no preference among themselves (s. 24).

Priority of
interest.

Receiver.

It provides for the appointment of a receiver when the interest is in arrear (ss. 25, 26). And also empowers the holders of stock to sue for it (s. 27); and provides for registration and certificates to holders of stock (ss. 28, 29).

Saving rights
of prior
mortgagees,
etc.

280. The debenture stock does not affect mortgages or bonds legally granted before it was created, or the power of the company to raise money on mortgage or bond; and it entitles holders to the rights and powers of mortgagees, except the right to require repayment of the principal paid up in respect of it (ss. 30, 31).

Application
of money
raised.

281. The money raised is to be applied exclusively in payment of the money due by the company on mortgage or bond, or for the purpose for which it would be payable if raised by mortgage or bond (s. 32).

Separate
accounts of
stock.

282. The company is bound to keep separate accounts of debenture stock; and to the extent of the money borrowed, the powers of borrowing and re-borrowing by the company are extinguished (ss. 33, 34): but money raised for and applied in the discharge of statutory bonds or mortgages, shall be deemed to be borrowed within, and not in excess of, the statutory powers (32 & 33 Vict. c. 48, s. 4).

Railway
Securities
Act, 1866.

283. By section 18 of the Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), various duties are cast upon railway

(*g*) *Chambers v. Manchester and Milford Rail. Co.*, 10 Jur. (N.S.) 700.

(*h*) 26 & 27 Vict. c. 118, s. 22; 32 & 33 Vict. c. 48, s. 1.

companies and tramway companies in relation to loans, but non-compliance with these merely causes the directors and officers to become liable to penalties, and does not affect the validity of loans, nor any question between the company and those who have advanced the loans.

Paragraphs
283—284

284. The mortgages or charges of limited companies formed under the now repealed Companies Acts, 1862 to 1907, or (since the 1st April, 1909) under the Companies Consolidation Act, 1908 (*i*) (which now governs this class of company), are subject to elaborate statutory provisions requiring registration of such securities both with the registration of joint stock companies and also in a register of mortgages to be kept by each company. These provisions are contained in sections 93 to 102 of the Act of 1908, and are shortly as follows :—

Registration
of the
securities of
limited
companies.

(1) Registration within 21 days after its creation (*k*) with the registrar of joint stock companies is essential to the validity as against the liquidator or any creditor of the company, of every mortgage or charge falling under any of the following heads :—

- (a) for securing any issue of debentures ;
- (b) on uncalled capital ;
- (c) created by an instrument which if executed by an individual would require registration as a bill of sale ;
- (d) on any land or any interest therein wherever situate ;
- (e) on book debts ;
- (f) a floating charge (*l*) or the undertaking or property of the company.

The deposit by the company of a negotiable instrument given to the company for any book debt is not to be treated as a mortgage or charge on such book debt ; and the holding of debentures, entitling the holder to a charge on land, is not to be deemed an interest in land.

The Act also contains details (which would be out of place in this work) of the information to be furnished to the registrar, and provides that the registrar is to give a certificate of the registration of any mortgage, which is to be conclusive that the requirements of the Act have been complied with (*m*). It is the duty of the company to effect the registration, but any person interested may apply for it and recover from the company the fees paid to the registrar. The register is open to any person in payment of a fee

(i) 8 Ed. 7, c. 69.

(k) See *Re Spiral Globe, Ltd.* (No. 2), *Watson v. The Co.*, [1902] 2 Ch. 209. In *re Harrogate Estates, Ltd.*, [1903] 1 Ch. 498 ; *Re Defries & Co., Ltd.*, *Bowen v. The Co.*, [1904] 1 Ch. 37.

(l) *Illingworth v. Houldsworth*, [1904] A. C. 355.

(m) *Re Yolland, Husson and Birkett, Ltd., Leicester v. The Co.*, [1908] 1 Ch. 152 ; *Cunard Steamship Co. v. Hopwood*, [1908] 2 Ch. 564.

Paragraphs
284—287

not exceeding 1s. The register may be rectified or the time for registration be extended (*n*) by a judge of the High Court, and satisfaction of any mortgage or charge is to be entered by the registrar. Lastly, heavy penalties are imposed on the company for omitting to register (*o*).

The register does not give necessarily notice of all the contents of the registered instrument.

(2) In addition to the above register to be kept (*p*) by the registrar of joint stock companies, the Act requires such company to keep a register of its own mortgages, and copies of all instruments required with the registration, and also the companies' own registers are to be open to the inspection of any creditor or member of the company without fee, and to the inspection of the public generally on payment of a fee not exceeding 1s. Registration in this register is not, however, essential to the validity of a mortgage or charge, and any neglect by the company to keep it is merely visited by penalties.

Where prohibited from borrowing, corporation may sometimes attain its object by selling with option to re-purchase.

285. Even where a trading company is prohibited from borrowing, it may lawfully attain its object of raising money, by selling part of its working stock, which it has power to sell, and borrowing it back from the purchaser at a rent which will repay him with interest, subject to an agreement for re-purchase on that event at a nominal price, if the transaction be open and *bonâ fide* (*q*). But such a company could not borrow so as to create a *debt*; a bond (such as those known as Lloyd's bonds) issued for securing a debt would be *ultra vires* and void (*r*).

Power to borrow and mortgage empowers mortgage to indemnify a surety.

Power of directors to

286. A power to borrow, and secure the sum borrowed by mortgage, enables a company to give a mortgage to a surety by way of indemnity, even where such surety is a director of the company (*s*).

287. The question whether directors of a company have power to charge its uncalled capital, has given rise to much discussion. It would seem that, unless prohibited or restricted, the directors of ordinary trading or finance companies have an implied power to do

(*n*) For decisions as to such rectification and extension of time, see *Re Mendip Press, Ltd.*, 18 T. L. R. 38, *Re S. Abrahams & Sons*, [1902] 1 Ch. 695; *Re I. C. Johnson & Co., Ltd.*, [1902] 2 Ch. 101; *Re Anglo-Oriental Carpet Manufacturing Co., Ltd.*, [1903] 1 Ch. 914; *Re Ehrmann Brothers, Ltd.*, *Albert v. Ehamann Bros., Ltd.*, [1906] 2 Ch. 697; *Re Cardiff Workmen's Cottages Co., Ltd.*, [1906] 2 Ch. 627; *Re Bootle Cold Storage & Ice Co.*, [1901] W. N. 54; *Re Joplin Brewery Co., Ltd.*, [1902] 1 Ch. 79.

(*o*) With regard to the necessity for registration, in several instances reference may be made to *Cornbrook Brewery Co., Ltd.*, *v. Law Debenture Corporation, Ltd.*, [1904] 1 Ch. 103; *Bristol United Breweries, Ltd.*, *v. Abbott*, [1908] 1 Ch. 279; *Re New London and Suburban Omnibus Co., Ltd.*, *Appleyard v. The Co.*, [1908] 1 Ch. 621; as to procedure, see *Re Cunard Steamship Co., Ltd.*, [1908] W. N. 160.

(*p*) *Re Standard Rotary Machine Co., Ltd.*, 95 L. T. 829.

(*q*) *Yorkshire Railway Wagon Co. v. Maclure*, 21 Ch. D. 309.

(*r*) See *per* Lord WENSLEYDALE, in *South Yorkshire Rail. Co. v. Great Northern Rail. Co.*, 9 Ex. 55.

(*s*) *Re Pyle Works* (No. 2), [1891] 1 Ch. 173.

so (t). Where, however, their borrowing powers are defined, this power may be impliedly negatived, on the principle of *expressio unius exclusio alterius est*. Thus directors cannot, under an authority to borrow on the security of the "funds and property" of a company, mortgage *uncalled* capital, as it is only *sub modo* the property of the company (u). But if the call had already been made, the charge would be good (x). But where the words used were "property and rights," the decision was the other way (y); as it was also where directors were authorized to give "any security of any description" (z), or to borrow "in any other manner" (a) (175).

Paragraphs
287—290

charge
uncalled
capital.

288. It has been also held, that directors may even mortgage unissued shares, if there be a power to borrow a sum not exceeding a proportion of the capital not called up, and the definition of capital includes nominal capital (b).

Power to
mortgage
unissued
shares.

289. It has been held by the late V.-C. *Bacon*, that a power to mortgage "the property of a company" authorized a mortgage of book debts not yet accrued (c); but it is difficult to reconcile this decision with some others (d). See also (67).

Power to
mortgage
future book
debts.

290. Another proposition which appears to be deducible from the authorities, is, that where the statutory authority under which a company is established contains no restrictions on the exercise of the borrowing power outside those of the deed of settlement which confers it, the lender is not bound to look beyond the deed of settlement; but finding that it empowers the company to borrow, may assume that it has done such preliminary acts, as the passing of resolutions, etc., which the deed requires (e). But where the

How far
mortgagee
bound to see
that company
has power to
mortgage.

(t) See *per* CHITTY, J., *Jackson v. Rainford Coal Co.*, [1896] 2 Ch. 340.

(u) *Re British Provident, etc., Society*, 4 De G. J. & S., 407; *Re Sankey Brook Coal Co.* (No. 2), L. R. 10 Eq. 381; *Bank of South Australia v. Abrahams*, L. R. 6 P. C. 265; and see *Re Streatham and General Estates Co.*, [1897] 1 Ch. 15. But see and consider statutory form of mortgage in Companies Clauses Consolidation Act, 1845, Schedule C., and *Wickham v. New Brunswick and Canada Railway Co.*, L. R. 1 P. C. 64.

(x) *Re Sankey Brook Coal Co.* (No. 2), *supra*; *Pickering v. Ilfracombe Rail. Co.*, L. R. 3 C. P. 235; *Re International Life Assurance Co., Gibbs' and West's Case*, L. R. 10 Eq. 312; but see *Re New Clydach, etc., Iron Co.*, L. R. 6 Eq. 514; and *Re Dublin Drapery Co.*, 13 L. R. Ir. 174.

(y) *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. 156.

(z) *Newton v. Debenture Holders of Anglo-Australian Investment, etc., Co.*, [1895] A. C. 244; *Re Pyle Works*, 44 Ch. D. 534; *Re Phoenix Bessemer Steel Co.*, 44 L. J. Ch. 683; *Howard v. Patent Ivory Manufacturing Co.*, *supra*.

(a) *Jackson v. Rainford Coal Co.*, [1896] 2 Ch. 340.

(b) *English Channel Steamship Co. v. Rolt*, 17 Ch. D. 715.

(c) *Bloomer v. Union Coal and Iron Co.*, L. R. 16 Eq. 383.

(d) *Re New Clydach, etc., Iron Co.*, L. R. 6 Eq. 514; and see cases cited, *supra*, note (u).

(e) *Royal British Bank v. Turquand*, 6 El. & Bl. 327; *Agar v. Athenæum Life Assurance Society*, 3 C. B. (N.S.) 725; *Re Athenæum Life Assurance Society, Exp. Eagle Insurance Co.*, 4 K. & J. 549; *Landowners, etc., Drainage & Inclosure Co. v. Ashford*, 16 Ch. D. 411. And this is so even where the secretary of the borrowing company knew of the irregularity, he being also secretary of the lending company: *Re Hampshire Land Co.*, [1896] 2 Ch. 743.

Paragraphs
290—293

statutory authority provides specially what shall be evidence of the performance of the preliminary acts (*f*), or where the security would, on the face of the articles, be *ultra vires* unless the power be extended by the shareholders (*g*), the lender must see that whatever is necessary must be done.

How far
mortgagee
bound to see
that directors
are qualified.

291. On similar principles, where articles of association provide what shall be evidence sufficient to authorize third persons to deal with directors, such third persons, although bound to see that such evidence is forthcoming, need not go behind it. Thus, where articles of association provide that any security issued under the company's seal shall be binding on the company, notwithstanding any irregularity touching the authority of the directors, the security is good, even although some of the directors be disqualified (*h*).

Mere over-
draft not
borrowing.

292. The mere overdraft of its banker's account by a company in the ordinary course of business, has been held not to be a transaction upon which a question as to its borrowing powers can arise (*i*); but it is otherwise where a secured loan is deliberately made by way of overdraft (*k*).

Powers of
municipal
corporations
outside
London to
borrow on
mortgage.

293. A town council may, with the approval of the Local Government Board, but not otherwise, borrow at interest on the security of the corporate land, or of any land proposed to be purchased by them, or of the borough fund or borough rate, or of all or any of those securities, such sums as the council may from time to time think requisite for the purchase of land, or for the building of any building which the council are authorized to build (*l*), or for acquiring land under the Military Lands Act, 1892 (*m*), or for the formation of a fund for payment of compensation in respect of forged transfers (*n*), or for maintaining or repairing borough bridges (*o*), or for the discharge of debts lawfully contracted before the Act 5 & 6 Will. 4, c. 76 (*p*), or for adjustments under the Local Government Act, 1888 (*q*), or for purposes of technical instruction (*r*), or for the purposes of the Diseases of Animals Act, 1894 (*s*), or of the Inebriates Act, 1898 (*t*), or of the Education Act, 1902 (*u*), or (on the security of the borough rate) for the purpose of acquiring, improving and adapting land under the Allotments Act, 1887 (*x*). And where there is an appeal from the

(*f*) *Fountaine v. Carmarthen Rail. Co.*, L. R. 5 Eq. 316.

(*g*) *Irvine v. Union Bank of Australia*, 2 App. Cas. 366.

(*h*) *Davies v. Bolton & Co.*, [1894] 3 Ch. 678; but see and consider *Baroness Wenlock v. River Dee Co.*, 10 App. Cas. 354; and *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653.

(*i*) *Waterlow v. Sharp*, L. R. 8 Eq. 501.

(*k*) *Looker v. Wrigley*, 9 Q. B. D. 397.

(*l*) 45 & 46 Vict. c. 50, s. 106.

(*m*) 55 & 56 Vict. c. 43, s. 6.

(*n*) 54 & 55 Vict. c. 43, s. 3.

(*o*) 45 & 46 Vict. c. 50, s. 119.

(*p*) 45 & 46 Vict. c. 50, s. 131.

(*q*) 51 & 52 Vict. c. 41, s. 62.

(*r*) 52 & 53 Vict. c. 76, s. 4.

(*s*) 57 & 58 Vict. c. 57, s. 42.

(*t*) 61 & 62 Vict. c. 60.

(*u*) 2 Ed. 7, c. 42, s. 19.

(*x*) 50 & 51 Vict. c. 48, s. 10.

sanitary authority to the county council under the Allotments Act, 1890, the latter may borrow on the security of the former's rate (*y*). Paragraphs
293—294

In addition to the above general powers, most municipal corporations of any importance have special statutes or orders of the Local Government Board authorizing borrowing on a large scale, secured by the issue of stock charged on the rates, and repayable by means of a sinking fund.

The following statutes govern the powers of borrowing by Metropolitan Borough Councils, viz.: The Metropolis Management Act, 1855 (*z*), the Metropolitan Management Amendment Act, 1862 (*a*); the Public Health (London) Act, 1891 (*b*); as amended by the London County Council (General Powers) Act, 1896 (*c*); the London Government Act, 1899 (*d*). Metropolitan
Municipal
Corporations.

294. A county council may borrow with the consent of the Local Government Board, but not otherwise, on the security of the county fund, or of any revenues of the council, or on either or any part of either of them, for the following purposes, viz.:—(1) For consolidating the debts of the county; (2) for purchasing any land or building any building which the council are authorized by any Act to purchase or build; (3) for any permanent work or other thing which the county council are authorized to execute or do, and the cost of which ought, in the opinion of the Local Government Board, to be spread over a term of years; (4) for making advances to any persons or bodies of persons, corporate or unincorporate, in aid of the emigration or colonization of inhabitants of the county, with a guarantee for the repayment of such advances from any local authority in the county or the government of any colony; (5) for any purpose for which quarter sessions or the county council are authorized by any Act to borrow (*e*); (6) For the purposes of adjusting property, debts, and liabilities (*f*). All loans are to be paid off by means of a sinking fund within such period not exceeding thirty years, as the council, with the consent of the Local Government Board, may determine, and they can only borrow up to one-tenth of their saleable value (*g*). The money may be raised by one loan or several, and either by stock or debentures, or annuity certificates under the Local Loans Act, 1875, and the Acts amending the same, or, *if special reasons exist for so borrowing*, Powers of
county
councils to
borrow on
mortgage.

(*y*) 53 & 54 Vict. c. 65, s. 4.

(*z*) 18 & 19 Vict. c. 120, ss. 183–191.

(*a*) 25 & 26 Vict. c. 102, ss. 72, 109.

(*e*) 51 & 52 Vict. c. 41, s. 69.

(*b*) 54 & 55 Vict. c. 76, s. 105.

(*c*) 59 & 60 Vict. c. clxxxviii. s. 32.

(*d*) 62 & 63 Vict. c. 14, s. 4.

These purposes include shire halls, county halls, sessions houses and judges' lodgings (County Buildings Act, 1826, 7 Geo. 4, c. 63); station houses and strong rooms (3 & 4 Vict. c. 88, s. 12); public works (38 & 39 Vict. c. 89, s. 40); County Bridges (43 & 44 Vict. c. 5, and as to South Wales 44 & 45 Vict. c. 14), and reformatory and industrial schools (37 & 38 Vict. c. 47).

(*f*) 51 & 52 Vict. c. 41, s. 62 (6).

(*g*) See s. 69 (2) of 51 & 52 Vict. c. 41.

Paragraphs
294—296

by mortgage in accordance with ss. 236 and 237 of the Public Health Act, 1875. Provided that where a county council has borrowed by means of stock, they are not to borrow by way of mortgage, except for a period not exceeding five years, and where they borrow by debentures, such debentures must not be for a less sum than 5*l.* each. Such debentures issued under the Local Loans Act, 1875, charge the above-mentioned funds or revenues with the payment of principal and interest (*h*). Annuity certificates may be issued under the local Loans Act, charging the same funds and revenues with the payment of annual sums of not less than 3*l.*, which includes interest (*i*). Both debentures and annuity certificates may be made payable to bearer, or to a person named, his executors, administrators, or assigns, in which latter case they are transferable by writing, as the council, with the consent of the Local Government Board, may by rules direct (*k*). With regard to mortgages, every such mortgage is to be made by deed, truly stating the date and consideration, and time and place of payment, and must be sealed with the common seal, and be made in accordance with a form scheduled to the Public Health Act, 1875. The county council has to keep a register of its mortgages on each rate open to public inspection during office hours.

Form of
mortgages by
municipal
corporations
and county
councils.

Powers of
parish and
district
councils and
Boards of
Guardians to
borrow on
mortgage.

295. Powers of borrowing for certain purposes are conferred on parish councils by ss. 11 and 12 of the Local Government Act, 1894, but the consent of the Local Government Board is necessary. The security is to be the poor rate, and the whole or part of the revenues of the council. Rural district councils have considerable powers of borrowing by virtue of s. 25 of the Local Government Act, 1894, and ss. 233 to 244 of the Public Health Act, 1875. The Acts relating to the borrowing powers of Boards of Guardians are 27 & 28 Vict. c. 39, s. 8; 52 & 53 Vict. c. 56; and 60 & 61 Vict. c. 29.

Powers of
com-
missioners to
borrow on
mortgage.

296. Bodies of commissioners formed by special Act of Parliament, incorporating the Commissioners Clauses Act, 1847 (*l*), may borrow on the security of their rates or other property. The Act provides for the form of mortgages (*m*), for the registration of mortgages, and for transfers and registration of transfers (*n*), for the payment of interest (*o*), for re-borrowing to pay off securities (*p*), for the repayment of loans and cesser of interest (*q*), the creation of a sinking fund (*r*), the order of discharging securities of the same class (*s*), the appointment of a receiver (*t*), and the inspection of accounts (*u*). As to Commissioners of Sewers the reader is referred to the Public Money Drainage Act, 1847 (*x*).

(*h*) 38 & 39 Vict. c. 83, ss. 5, 36.

(*i*) *Ib.*, s. 7.

(*k*) *Ib.*, ss. 5 & 7.

(*l*) 10 & 11 Vict. c. 16.

(*m*) *Ib.*, s. 75.

(*n*) *Ib.*, ss. 76—78.

(*o*) *Ib.*, s. 79.

(*p*) *Ib.*, s. 80.

(*q*) *Ib.*, ss. 81—83.

(*r*) *Ib.*, s. 84.

(*s*) *Ib.*, s. 85.

(*t*) *Ib.*, ss. 86, 87.

(*u*) *Ib.*, s. 88.

(*x*) 10 & 11 Vict. c. 11.

SECTION III.

Paragraph
297**Of Securities by Benefit, Building, or Friendly Societies.**

	PARAGRAPH
<i>Provisions of Building Societies Acts, 1874 and 1894</i>	297
<i>Provisions of Friendly Societies Acts, 1875</i>	298

297. By the Building Societies Act, 1874 (c. 42), s. 15 :—Provisions of
Building
Societies
Acts, 1874
and 1894.

- (1) Any society under the Act may receive deposits or loans at interest from members or others, corporate bodies, joint stock companies, or any terminating building society, to be applied for the purposes of the society.
- (2) In a permanent society, the total amount so received on deposit or loan and not repaid by the society shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members. But in ascertaining this amount it is not to be limited merely to the principal secured to the society, but includes all sums due for the time being on members' securities, whether for principal, interest, fines, or otherwise, and all instalments, whether due or not; and in ascertaining the amounts advanced out of an *ultra vires* loan the whole amount secured is to be included, although part was deducted for commission (*y*). Provided that in calculating the amount secured on properties, the payments in respect of which are twelve months in arrears at the date of the society's last annual account, and the amount secured on properties of which the society had been in possession for twelve months before such accounts, are to be disregarded (*z*).
- (3) In a terminating society, a sum may be borrowed either not exceeding such two-thirds, or not exceeding twelve months' subscription on the shares for the time being in force.

It may be assumed, though it is not so expressly stated in the Act, that the society may mortgage its property for securing such loans or deposits (*a*).

A loan to a society which was in its inception invalid is not

(*y*) *Neath Building Society v. Luce*, 43 Ch D. 158; and see also *Re West Riding of Yorkshire, etc., Building Society*, 45 Ch. D. 463.

(*z*) 57 & 58 Vict. c. 47, s. 14.

(*a*) See *Murray v. Scott*, 9 App. Cas. 519.

Paragraphs validated by this Act (b), nor by a subsequent rule purporting to
297—299 validate it (c).

Provisions of **298.** By the Friendly Societies Act, 1896 (c. 25), s. 47 (1), a
Friendly friendly society, or any branch of such a society, may, if the rules
Societies thereof so provide (and with a limitation as to benevolent societies),
Act, 1896. hold, purchase, or take on lease any land in the names of its trustees,
and may mortgage the same ; and no mortgagee shall be bound to
enquire as to the authority for any mortgage by the trustees ; and
the receipt of the trustees shall be a discharge for all moneys arising
from or in connection with such mortgage (d). Section 36 of the
Industrial and Provident Societies Act, 1893, gives similar powers
to industrial and provident societies.

SECTION IV.

Of Securities by Married Women.

	PARAGRAPH
<i>Married women divisible, in relation to their proprietary rights, into three classes</i>	299

SUB-SECTION (1).—*Securities by Married Women whose property is not separate either by settlement or statute.*

<i>Married women can mortgage real estate under Fines and Recoveries Act</i> ..	300
<i>Married women can mortgage reversionary choses in action under Malins' Act</i>	301
<i>Except under Malins' Act, choses in action cannot be mortgaged by married women</i>	302
<i>Equitable mortgage by husband of wife's chose in action is not a reduction into possession</i>	303
<i>Wife's equity to a settlement</i>	304
<i>Ratification by widow of invalid mortgage made during coverture</i>	305

SUB-SECTION (2).—*Securities by Married Women on property settled to their separate use.*

<i>Married women, unless restrained from anticipation, can mortgage property settled to their separate use</i>	306
<i>Before Act of 1882, a married woman could not bind future separate estate</i>	307
<i>Property over which a married woman has a general power</i>	308
<i>How a married woman can charge her separate estate</i>	309

SUB-SECTION (3).—*Securities by Married Women holding property under the Married Women's Property Act, 1882 and 1893.*

<i>Women to whom the Acts apply</i>	310
<i>General effect of Acts</i>	311
<i>Woman who mortgages her property for her husband's debts, stands in the shoes of the mortgagee</i>	312

Married **299.** In course of time, when all women married before January
women 1st, 1883, shall have died or become widows, and when, therefore,

(b) *Ex parte Watson*, 21 Q. B. D. 301.
(c) *Re Bottomgate Society*, 65 L. T. 712 ; but cf. *Murray v. Scott*, 9 App. Cas. 519,
(d) Societies may also (whether their rules provide for it or not) mortgage for the purpose of providing a fund under the Forged Transfers Act, 1891, ss. 1 and 3.

all married women will have come within the provisions of the Married Women's Property Act, 1882 (which applies to all women married on and after January 1st, 1883), there will be no occasion to consider the law relating to securities by married women apart from similar securities created by men. At present, however, it is necessary to consider such securities under three heads, viz. :—

(1) Securities by married women to whom the Act does not apply, and whose property is not settled by deed or will to their separate use ; (2) securities by married women whose property is settled to their separate use by deed or will ; and (3) securities by married women to whom the Act applies.

Paragraphs
299—300

divisible into
three classes.

SUB-SECTION (1).—*Securities by Married Women whose Property is not separate either by Statute or Settlement.*

300. At common law, apart from statute, married women were practically unable to create securities, except as to real estate by means of a fine. Since 1834, however, this has been considerably modified ; and married women to whom the Married Women's Property Act, 1882, does not apply, can, nevertheless, deal with their real estate (not settled to their separate use) by virtue of the Fines and Recoveries Act (*e*), under which a married woman, with the consent of her husband, may mortgage her interest, whether in possession or reversion, not only in lands (except in certain cases copyholds), and money subject to be invested in the purchase of lands, but also in the proceeds of land directed to be sold, to the exclusion of her equity to a settlement (*f*). The husband and wife, or the husband alone, may also (*g*) during the coverture, dispose by sale or mortgage of the wife's term of years, whether legal or equitable, or whatever be the nature of her interest therein. The assignment of her legal interest in the term will, like a complete assurance of her real estate, be absolutely binding upon her ; and even a voluntary assignment (apart from any question arising from actual fraud) so completely divests her right, that a subsequent mortgage after the death of her husband did not (even before the Voluntary Conveyances Act, 1893) operate as a revocation under the statute 27 Eliz. c. 4 (*h*).

Married
women can
mortgage
real estate
under Fines
and
Recoveries
Act.

(*e*) 3 & 4 Will. 4, c. 74, s. 77. As to the statutory formalities, see the Conveyancing Act, 1882, s. 7, applicable to deeds executed after December 31st, 1882.

(*f*) *Briggs v. Chamberlain*, 11 Hare, 69 ; 18 Jur. 56 ; on the authority of *May v. Roper*, 4 Sim. 360, before the Act, and notwithstanding *Hobby v. Allen*, 15 Jur. 835 ; see *Williams v. Cooke*, 9 Jur. (N.S.) 658 ; 4 Giff. 343. An equitable reversionary life interest in money invested on mortgage of land is an interest in land within this Act (*Miller v. Collins*, [1896] 1 Ch. 573, KAY, L.J., *dissentiente*).

(*g*) *Bates v. Dandy*, 2 Atk. 207 ; 3 Russ. 72, n. ; *Donne v. Hart*, 2 Russ. & Myl. 360 ; *Sir E. Turner's case*, 1 Vern. 7.

(*h*) *Hill v. Edmonds*, 5 De G. & Sm. 603 ; *Hatchell v. Egglex*, 1 Ir. Ch. R. 215 ; *Doe d. Richards v. Lewis*, 15 Jur. 512 ; 11 C. B. 1035.

Paragraphs
301—302

Married women can mortgage reversionary choses in action under Malins' Act.

301. Similarly, a woman, to whom the Married Women's Property Act does not apply, and whose property is not settled to her separate use, can, nevertheless, deal with her reversionary interests in personal estate, under Sir R. Malins' Act (*i*), whereby every married woman may by deed dispose of every future or reversionary interest, whether vested or contingent, of her, or her husband in her right, in any personal estate to which she shall be entitled under any instrument made after December 31st, 1857 (except a settlement or agreement for a settlement made on her marriage), and may release or extinguish any power vested in her in regard to any such personal estate, as effectually as she could do if she were a *feme sole*; and may extinguish her equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument; the deed being made with the concurrence of the husband, and being acknowledged by the married woman in the manner required by the Fines and Recoveries Act (*k*). The Act does not extend to reversionary interests which the married woman is restrained from alienating or affecting, nor to powers which are vested in her independently of the Act.

Except under Malins' Act, married women cannot mortgage choses in action.

302. Except under the last-mentioned Act, no disposition of the wife's choses in action not held for her separate use or forming part of her separate estate under the Act of 1882, whether made with or without her concurrence, will generally affect her title by survivorship (after her husband has died without having reduced the property into possession (*l*)), or her statutory title as a *feme sole*, where, after the mortgage, she has obtained a decree of judicial separation and is living apart from her husband (*m*), either as against the particular assignee of the fund or the assignee in bankruptcy of the husband: the result being the same whether the husband had or had not the opportunity of reducing the fund into possession in his lifetime (*n*). And if the title of the wife surviving, be for any reason doubtful, it will still prevail, if, by a decree in a suit affecting the property, the fund have been ordered to be paid to her (*o*), or she have acquired a legal title (*p*); as by being executor of the person under whose will she is entitled to the fund.

A security which would be invalid under the general rule, will not be made good because the original agreement for the loan was

(*i*) 20 & 21 Vict. c. 57 (1857).

(*k*) 3 & 4 Will. 4, c. 74. In Ireland, 4 & 5 Will. 4, c. 92.

(*l*) *Purdew v. Jackson*, 1 Russ. 1; *Hornsby v. Lee*, 2 Madd. 16; *Honner v. Morton*, 3 Russ. 65; *Wilkinson v. Charlesworth*, 10 Beav. 324.

(*m*) 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8; *Re Insole*, L. R. 1 Eq. 470.

(*n*) *Ellison v. Elwin*, 13 Sim. 309; *Ashby v. Ashby*, 1 Coll. C. C. 553.

(*o*) *Hutchings v. Smith*, 9 Sim. 137.

(*p*) *Michelmores v. Mudge*, 2 Giff. 183.

made by the wife before marriage (*q*) ; but her right will be barred if the chose in action was created for the sole purpose of the mortgage, and she never had any distinct interest in it otherwise than subject to the security (*r*).

Paragraphs
302—304

303. Where the chose in action consists of a mortgage debt, the deposit by the husband of the deeds of the estate, by way of equitable mortgage, will not be a reduction of the mortgage debt into possession : the possession of the deeds, either by the husband or the deposittee, not being equivalent to, but only giving a right to obtain possession of the money (*s*).

Equitable mortgage by husband of a wife's chose in action not a reduction into possession.

304. But the equitable interest for life of the wife, in real or personal estate, is subject to her equity to a settlement as against the trustee in bankruptcy of her husband (*t*), and also against the mortgagee of the wife's equitable absolute interest in a term of years (*u*) ; although the application of the doctrine, under any circumstances, to equitable interests in land, appears to be inconsistent with the rule formerly observed, viz., that such interests were not subject to the same equity as personalty, because of their analogy to legal estates (*x*). The wife's equity, however, has been held not to be enforceable against a mortgagee of the husband's interest in the wife's land, where she is seised of the inheritance (*y*) ; nor against the assignee for value of her equitable interest in real or personal estate, whether it be immediate or reversionary, where, at the time of the assignment, the husband was willing and able to maintain her. And her equity cannot be revived by the husband's

Wife's equity to a settlement.

(*q*) *Prole v. Soady*, L. R. 3 Ch. 220. The mortgage by the husband of the wife's land tax, after he has been registered as husband under 38 Geo. 3, c. 60, s. 78, is binding to the extent of the security, but is no alienation of her interest as survivor beyond the amount of the mortgage debt. (*Id.*)

(*r*) *Winter v. Easum*, 2 De G., J. & S. 272.

(*s*) *Michelmores v. Mudge*, *supra*. If the assignment be made under the law of a foreign country, it will be treated, in the absence of evidence as to the husband's rights under that law, only as an assignment of the husband's chance of survivorship, and a stop order will be granted only during the husband's life. *Moreau v. Polley*, 1 De G. & Sm. 143.

(*t*) *Sturgis v. Champneys*, 5 Myl. & Cr. 97 ; *Barnes v. Robinson*, 9 Jur. (N.S.) 245.

(*u*) *Hanson v. Keating*, 4 Hare, 1.

(*x*) See *Hanson v. Keating*, 4 Hare, 1 ; *Sir E. Turner's case*, 1 Vern. 7. It does not appear that Lord HARDWICKE disapproved of this case, as Lord COTTENHAM seems to have inferred (*Sturgis v. Champneys*, 5 Myl. & Cr. at p. 107) from the report in *Jewson v. Moulson*, 2 Atk. 421. In the report of *Bates v. Dandy*, 3 Russ. 72, n., Lord HARDWICKE speaks of *Turner's case* as accepted law and the foundation of many authorities.

(*y*) *Durham v. Crackles*, 8 Jur. (N.S.) 1174 ; see *Newenham v. Pemberton*, 17 L. J. Ch. 99. In *Duncombe v. Greenacre*, 28 Beav. 472 ; 29 Beav. 578 ; 7 Jur. (N.S.) 175, the wife was entitled to money charged on land, and secured by powers of entry, sale and mortgage ; and which was assigned by the husband for valuable consideration. In a suit by the wife to have the charge raised, and for a settlement, an objection of the assignees to the payment of the fund into court by the owner of the estate, on the ground that the wife would then become entitled to a settlement, was overruled ; and the fund having been paid in, the whole of it was afterwards settled.

Paragraphs
304—306

subsequent refusal or neglect to do so (z). And it cannot be claimed out of the past income of such property as against a mortgagee (a).

The wife may enforce her right to a settlement, as well in a suit by herself, as by the person claiming under the assignment or insolvency; and she is not deprived of it because she has the legal reversion, if an outstanding legal interest leaves her with a present right which is enforceable only in equity (b).

Ratification
by widow of
invalid
mortgage
made during
coverture.

305. It has been held (c) that a mortgage, without fine, by husband and wife, of her real estate for a term, was established after the death of the husband by her acts, amounting to a redelivery of the deed, and therefore to a new grant; she having given up possession and directed the tenants to attorn to the mortgagee, and accounted to him as such. But the mere payment of interest by the widow has been held (d) not to set up such a mortgage, because the term ceased absolutely at the husband's death; though it was said that by acceptance of rent, if any had been reserved, the mortgage would have stood. These decisions can hardly be regarded otherwise than as contradictory. The principle of the latter is affirmed by a modern case, in which a joint security, which was ineffectual by reason of the imperfect exercise of a power of appointment, was held not to bind the wife, though for many years after her husband's death she had paid interest upon it (e). The case *Goodright d. Carter v. Straphan* is supported by Mr. *Coventry* (f), on the ground that the lease was voidable only and not void; but this is contrary to the express judgment of Lord *Mansfield* and of the whole Court of King's Bench.

SUB-SECTION (2).—*Securities by Married Women on Property settled to their separate use.*

Married
women not
restrained
from
anticipating,
can mortgage
property

306. A married woman being entitled in equity under a will or settlement to hold property for her separate use, might (unless expressly restrained from anticipation or alienation (g)) (459) contract debts to be paid out of it, either by a direct mortgage or charge upon the separate estate, or by bond, promissory note, bill of

(z) *Elliott v. Cordell*, 5 Madd. 149; *Stanton v. Hall*, 2 Russ. & Myl. 175; *Tidd v. Lister*, 3 De G. M. & G. 857; *Re Duffy's Trust*, 28 Beav. 386; *Life Association of Scotland v. Siddall*, 3 De G. F. & J. 271.

(a) *Re Carr's Trusts*, L. R. 12 Eq. 609.

(b) *Barnes v. Robinson*, 9 Jur. (N.S.) 245; *Newenham v. Pemberton*, 17 L. J. Ch. 99.

(c) *Goodright d. Carter v. Straphan*, Lofft, 763; 1 Dougl. 53, n.; Cowp. 201.

(d) *Drybutter v. Bartholomew*, 2 P. Wms. 127.

(e) *Blandy v. Kimber*, 24 Beav. 148.

(f) Pow. Mort., ed. 6, 721 a, n. (g).

(g) The restraint may be removed by a judge of the Chancery Division (Conveyancing Act, 1881, s. 62). The restraint does not apply to income accrued but not paid (*Hood-Barrs v. Heriot*, [1896] A. C. 174) and *infra* (465).

exchange or written promise to pay the debt or demand, though not referring to her separate estate ; because, by this means only, the obligation could be satisfied (*h*). And the subsequent accession of the legal interest by the death of the husband would not defeat it, although the equitable separate estate which was the subject of the charge, was at an end (*i*). The power of contracting a debt upon the credit of the separate estate was treated as incident to the ownership of the estate (*k*), and was not, as was formerly thought, exercised by way of equitable appointment under the settlement (*l*).

Paragraphs
306—308
settled to
their separate
use.

The written engagements of a married woman would also be covered by her testamentary charge of her debts on her estate (*m*).

The separate estate of a married woman, which she is not restrained from anticipating, was (*n*) liable to debts contracted on her verbal or general engagement, provided it appeared that the engagement was made with reference to and on the credit of the separate estate ; a fact which was judged of by the court according to the circumstances of the case, and might be considered to be implied where the married woman was living apart from her husband (*o*). The mere transaction of business relating to the separate estate, or the husband and wife, did not make it liable to the costs (*p*).

307. A married woman could not, however, before the Act of 1882 (**311**) contract as a *feme sole* so as to bind her after-acquired separate estate. The only property bound was that which she had when the contract was made, and which could still be reached by the judgment and execution of the court (*q*) ; and a married woman's property was not bound by her general engagement until the creditor had recovered judgment, and could not be reached by injunction before that time (*r*).

Before Act
of 1882, a
married
woman could
not bind
future
separate
estate.

308. Where a married woman had a general power of appointment by deed or writing, the corpus of the property (subject to her right of mortgage or alienation) was liable (*s*) to all such debts or

Property
over which
a married
woman has

(*h*) *Hulme v. Tenant*, 1 Bro. C. C. 16 ; *Heatley v. Thomas*, 15 Ves. 596 ; *Bullpin v. Clarke*, 17 Ves. 365 ; *Field v. Sowle*, 4 Russ. 112 ; *Stuart v. Lord Kirkwall*, 3 Madd. 387 ; *Murray v. Barlee*, 3 Myl. & K. 209 ; *Greenough v. Sherrock*, 10 L. T. (N.S.) 316.

(*i*) *Major v. Lansley*, 2 Russ. & Myl. 355.

(*k*) *Owens v. Dickenson*, Cr. & Ph. 48. (*m*) *Owens v. Dickenson*, *supra*.

(*l*) *Field v. Sowle*, 4 Russ. 112. (*n*) *Pike v. Fitzgibbon*, 17 Ch. D. 454.

(*o*) *Tullett v. Armstrong*, 4 Beav. 319 ; *Vaughan v. Vanderstegen*, 2 Drew. 165 ; *Johnson v. Gallagher*, 7 Jur. (N.S.) 273 ; 3 De G. F. & J. at p. 515, *per* TURNER, L.J. ; *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 572 ; *Picard v. Hine*, L. R. 5 Ch. 274 ; *Mayd v. Field*, 3 Ch. D. 587 ; *Collett v. Dickenson*, 11 Ch. D. 687.

(*p*) *Callow v. Howle*, 1 De G. & Sm. 531.

(*q*) *Pike v. Fitzgibbon*, 17 Ch. D. 454.

(*r*) *Robinson v. Pickering*, 16 Ch. D. 660.

(*s*) *Hulme v. Tenant*, 1 Bro. C. C. 16 ; *Field v. Sowle*, 4 Russ. 112 ; *Johnson v. Gallagher*, *supra* ; *London Chartered Bank of Australia v. Lempriere*, *supra* ; *Re Harvey's Estate*, *Godfrey v. Harpen*, 13 Ch. D. 216.

Paragraphs
308—310

a general
power.

How a
married
woman can
charge her
separate
estate.

Women to
whom the
Act applies.

engagements as were chargeable on her separate estate ; because, as to the property subject to the power, she was a *feme sole*. The Act of 1882 (s. 4) expressly makes property appointed by a married woman under a general power, liable to her debts and other liabilities, like separate estate under the Act.

309. To create an effectual charge upon the separate estate of a married woman, the obligation must have been made under such circumstances, that it could only be satisfied by resorting to her separate estate, or she must have shown a clear intention to bind her interest. Her mere concurrence with her husband in a security, without any contract on her part, did not bind her separate estate, if the terms of the deed were consistent with an intention that the husband's interest alone should be bound (*t*) ; but if, by mistake, she should affect to appoint a larger interest than she has, the security would be good for her actual interest (*u*). And an assignment by her of property, to the income only of which she is entitled for her separate use, amounts to an assignment of her interest in the income (*x*).

SUB-SECTION (3).—*Securities by Married Women holding Property under the Married Women's Property Acts, 1882 & 1893.*

310. The Married Women's Property Act, 1882, applies only :—

- (a) To women married on or after January 1st, 1883 ; and
- (b) To women married prior to that date whose *title* to the property in question first accrued (*i.e.*, not necessarily in possession but in reversion or remainder vested or contingent (*y*) on or after January 1st, 1883 (*z*).

In the celebrated case of *Re Harkness & Alsopp*, 1896, 2 Ch. 358, North, J., held that the Act only applied to the *beneficial* interest of married women, and not to real estate held by them as trustees. But this decision was held not to apply to married women mortgagees (*a*), even where a married woman was one of several mortgagees who were stated to have advanced the money on a joint account (*b*). And ultimately by the Married Women's Property Act, 1907 (*c*), the decision in *Re Harkness & Alsopp* was reversed *ab initio*, except where some title or right has been acquired through or with the concurrence of the husband.

(*t*) *Tullett v. Armstrong*, 4 Beav. 319.

(*u*) *Wainwright v. Hardisty*, 2 Beav. 363.

(*x*) *Crosby v. Church*, 3 Beav. 485.

(*y*) *Reid v. Reid*, 31 Ch. D. 402.

(*z*) Act of 1882, s. 5.

(*a*) *Re Brooke & Fremlin's Contract*, [1898] 1 Ch. 647 ; and see *Re Howgate & Osborn's Contract*, [1902] 1 Ch. 451.

(*b*) *Re West & Hardy's Contract*, [1904] 1 Ch. 145.

(*c*) 7 Edw. 7, c. 18.

311. By s. 1 of the Act of 1882, it is enacted as follows :—

Paragraph
311

- (1.) A married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property (including things in action, s. 24) as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.
- (2.) A married woman shall be capable of entering into, and rendering herself liable in respect of, to the extent of her separate property, any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*.
- (3.) Every contract entered into by her shall be deemed to be a contract with respect to, and to bind her separate property, unless the contrary be shown.
- (4.) And shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

On the construction of sub-ss. (3) and (4) it was held that they could only apply where the married woman had *some* separate property at the date of the contract, and that if she had none, then the contract could not bind her future separate property (*d*); and moreover, that the onus lay on the plaintiff of proving that the married woman had such property at the date of the contract (*e*). Sub-section (4) also limited the right of the creditor to future *separate* property, which, of course, could only apply to property acquired by her during the coverture. To cure these obvious defects it was enacted by the Married Women's Property Act, 1893 (*f*), that, with regard to contracts made by married women after December 5th, 1893, every such contract

- (a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate estate, whether she is or is not in fact possessed of or entitled to any separate estate at the time when she enters into such contract ;
- (b) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to ; and
- (c) Shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of or entitled to.

By s. 19, the Act of 1882 does not interfere with settlements of the property of a married woman made before or after marriage, or

(*d*) *Leak v. Driffield*, 24 Q. B. D. 98 ; *Re Shakespear, Deakin v. Lakin*, 30 Ch. D. 169.

(*e*) *Palliser v. Gurney*, 19 Q. B. D. 519.

(*f*) 56 & 57 Vict. c. 63, s. 1.

Paragraphs
311—313

with any restriction against anticipation, at or after the passing of the Act, attached or to be attached to the enjoyment of any property or income by a married woman under any instrument; and this protection is continued by the 2nd section of the Act of 1893. But no restriction against anticipation, in any settlement, or agreement for a settlement by a woman, of her own property, shall be valid against debts contracted by her before marriage; and no settlement, or agreement for settlement, shall have any greater force or validity against her creditors, than a like settlement or agreement by a man would have against his creditors.

By s. 23, for the purposes of the Act, the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities, and be subject to the same jurisdiction as she would be if she were living.

By s. 24, the word “contract” includes the acceptance of any trust or of the office of executrix or administratrix; and the Act extends to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee, or executrix, or administratrix, before or after her marriage; her husband being freed therefrom, unless he has acted or interfered in the trust or administration.

Woman
mortgaging
her property
for her
husband's
debt, stand
in shoes of
mortgagee.

312. If a married woman mortgages her property to secure her husband's debt, and the mortgagee realizes the security, she is entitled to stand in the mortgagee's place by subrogation, and to prove against her husband's estate, notwithstanding s. 3 of the Married Women's Property Act, 1882 (g).

SECTION V.

Of Securities upon the Property of Infants.

	PARAGRAPH
<i>Mortgages by the court of the estates of infant heirs or devisees</i>	313
<i>Mortgages on behalf of infants under the Settled Land Acts</i>	314
<i>Infants' contracts and mortgages generally void</i>	315

Mortgages of
the estates of
infant heirs
or devisees.

313. Where in a suit for payment of debts, to which the heir or devisee of the deceased debtor may be liable, a court of equity shall decree the estates liable to the debts, to be sold or mortgaged for satisfaction thereof, the court may direct mortgages, as well as sales, to be made of the estates of the infant heir or devisee. And where hereditaments are devised in settlement by any person whose estate shall be liable for the payment of his debts, and by such devise shall be vested in any person or persons for life, or other limited interest, with any remainder, limitation or gift over which

(g) *Alexander v. Barnhill*, 21 L. R. Ir. 511; and see also *Re Flamank*, *Wood v. Cock*, 40 Ch. D. 461; 60 L. T. 376.

may not be vested, or may be vested in some person or persons from whom a conveyance or assurance cannot be obtained, or by way of executory devise, the court by which any such decree for payments of debt shall be made, may direct mortgages as well as sales of the hereditaments so devised in settlement; and may authorize them in cases where the tenant for life, or other person having a limited interest, or the first executory devisee, is an infant. And the infant may be compelled to execute a conveyance. The surplus moneys are declared to belong to the same persons who would have been owners of the hereditaments sold, if no sale or mortgage had been made (*h*).

Paragraphs
313—315

The Acts do not authorize the court to expend the sum directed by the decree to be raised by mortgage for payment of the debts, for the purpose of repairing the property proposed to be mortgaged, though it may be impossible otherwise to raise the money on the estate (*i*). Still less has the court jurisdiction to direct a disentailing deed of an infant's estate paid by way of mortgage even for providing maintenance for the infant (*j*), or to authorize a mortgage of a contingent interest coupled with a policy of assurance on the infant's life (*k*).

314. By the 59th section of the Settled Land Act, 1882, where an infant is seised of or entitled to land absolutely, he is to have all the powers of a tenant for life, and by s. 60 the powers of the Act may be exercised on his behalf by the trustees of the settlement, and if there be none, then by such person and in such manner as the court may either generally, or in a particular instance, order. As to what mortgages may be made by a tenant for life under this Act, see (321).

Mortgages on behalf of infants under the Settled Land Acts.

315. By the Infants Relief Act, 1874 (*l*), all contracts by infants, whether by speciality or simple contract, for the repayment of money lent or to be lent (*m*), or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, are absolutely void. By s. 2 no action can be brought against a person on any promise made after coming of age, to pay any debt contracted during infancy, nor upon any ratification when of age, of a contract made during infancy, whether there shall or shall not be any new consideration. And by the Betting and Loans (Infants) Act, 1892, s. 5, the principle of the statute is extended to a new mortgage given by a person who is of age in exchange for a

Infants' mortgages generally void.

(*h*) 11 Geo. 4 & 1 Will. 4, c. 47, ss. 11, 12, as amended and explained by 2 & 3 Vict. c. 60.

(*i*) *Hill v. Maurice*, 1 De G. & Sm. 214.

(*j*) *Re Hambrough*, *Hambrough v. Hambrough*, [1909] 2 Ch. 620.

(*k*) *Re Hamilton*, 31 Ch. D. 291, and *Cadman v. Cadman*, 33 Ch. D. 397. But where an infant is absolutely entitled in fee the Court has jurisdiction to mortgage the property for his maintenance, including past maintenance, *Re Howarth*, L. R. 8 Ch. 415.

(*l*) 37 & 38 Vict. c. 62.

(*m*) See *Nottingham Permanent Benefit Building Society v. Thurstan*, [1903] A. C. 6.

Paragraphs
315—316 mortgage made during infancy, which he then pays off (*n*). The Act does not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of law or equity, enter, except such as by law are voidable. A deed by an infant to secure advances for necessities is voidable (*o*).

SECTION VI.

Of Securities upon the Property of Lunatics.

	PARAGRAPH
<i>General power of court to order mortgage of lunatic's property for debts, main-tenance, etc.</i>	316
<i>Mortgages for improving the lunatic's estate</i>	317
<i>Persons to whom charge may be given</i>	318
<i>Nature and devolution of lunatic's equity of redemption</i>	319
<i>The above powers apply not only to lunatics so found by inquisition, but to divers other persons of unsound mind</i>	320

General power of court to order mortgage for debts, maintenance, etc.

316. By s. 117 of the Lunacy Act, 1890 (*p*), a lunacy judge may order that any property of a lunatic, whether present or future, may be sold, charged, mortgaged, dealt with, or disposed of, as the judge may think most expedient, for the purpose of raising, or securing, or repaying, with or without interest, money which is to be, or which has been applied, to all or any of the purposes following, viz. :—

1. The payment of the lunatic's debts or engagements ;
2. The discharge of any incumbrance on his property (*q*) ;
3. The payment of any debt or expenditure incurred or made for the lunatic's maintenance, or otherwise for his benefit ;
4. The payment of, or provision for, the expenses of his future maintenance ; and in that case the judge may direct the same to be payable either contingently (if the interest charged is a contingent or future one), or upon the happening of the event (if the interest is depending on an event which must happen), and either in a gross sum or in annual or other periodical sums, and at such times, and in such manner, as he thinks expedient.

The committee of the estate, or such person as the judge may

(*n*) 55 & 56 Vict. c. 4 ; cf. *Re Foulkes, Foulkes v. Hughes*, 69 L. T. 183, as to the law before the recent Act.

(*o*) *Martin v. Gale*, 4 Ch. D. 428.

(*p*) 53 Vict. c. 5.

(*q*) Where, in a partition suit, a conveyance of the lunatic's share had been made to her in tail, without providing for the costs which the decree had directed to be raised by mortgage, the Lords Justices refused to authorize the committee to raise them by mortgage. But an indorsement on the partition deed of a declaration that the limitations were to be considered as subject in equity to a prior charge, for the costs originally ordered to be raised, was authorized by STUART, V.-C. (*Re Bloomar*, 2 De G. F. & J. 154.)

approve, shall, in the name and on behalf of the lunatic, execute and do all such assurances and things for giving effect to any order under the Act as the judge directs ; and every such assurance and thing is to be as valid and effectual, and is to take effect accordingly subject only to any prior charge. On a disposition of the real estate of a married woman under this Act, it would seem that the judge cannot confer upon the committee a statutory power under which the legal estate will pass, so as to dispense with an acknowledgment under the Fines and Recoveries Act. But the conveyance by the committee under the order will bind the estate in the hands of the heir, so as to compel him to give effect to it by a valid conveyance (r).

Paragraphs
316—320

317. The judge may order, that the whole or part of the moneys expended, or to be expended under his order, for the permanent improvement, security or advantage of the property of the lunatic, or of any part thereof, shall, with interest, be a charge upon the improved property or any other property of the lunatic ; but so that no right of sale or foreclosure during the lifetime of the lunatic be conferred by the charge ; and the interest shall be kept down, during the lunatic's life, out of the income of his general estate, so far as the same shall be sufficient to bear it.

Mortgages
for improving
lunatic's
estate.

318. The charge may be made either to some person advancing the money, or if the money is paid out of the lunatic's general estate, to some person as trustee for him, as part of his personal estate.

Persons to
whom charge
may be given.

319. On any moneys being raised by sale, mortgage, charge, or other disposition of land, made in pursuance of any of the foregoing provisions, the lunatic and his heirs, next-of-kin, devisees, legatees, executors, administrators and assigns, shall have the like interest in the surplus moneys remaining, after the purposes for which the moneys so raised shall have been answered, as he or they would have had in the estate if no sale, mortgage, charge, or other disposition thereof had been made ; and the surplus moneys shall be of the same nature and character as the estate sold, mortgaged, charged or otherwise disposed of.

Nature and
devolution of
equity of
redemption.

320. By s. 116 of the Act it is enacted that the above powers and provisions shall apply not only

Above powers
apply to
persons of
unsound mind
not so found.

- (a) To lunatics so found by inquisition, but also
- (b) To lunatics not so found, for the protection or administration of whose property any order was made before the Lunacy Act, 1890 ; and
- (c) To every person lawfully detained as a lunatic ; and

Paragraph
320

- (d) To any person not so detained and not so found with regard to whom it is proved to the satisfaction of a lunacy judge that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs; and
- (e) To every person with regard to whom it is proved to the satisfaction of a lunacy judge by the certificate of a master, or by the report of the commissioners in lunacy, or by affidavit or otherwise, that such person is of unsound mind and incapable of managing his affairs, and that his property does not exceed 2000*l.* in value, or that the income thereof does not exceed 100*l.* per annum; and
- (f) To every person with regard to whom the judge is satisfied, by affidavit or otherwise, that such person is, or has been, a criminal lunatic, and continues to be insane and in confinement.

In the case of lunatics not so found, the powers above referred to are to be exercised by such person, in such manner, and with or without security, as the judge may direct. The order may either confer a specific authority, or a general authority to exercise, on behalf of the lunatic, until further order, all or any of the above powers.

SECTION VII.

Of Securities on the Fee Simple made by Tenants for Life or other Limited Owners.

SUB-SECTION (1).—*Under Settled Land Acts.*

	PARAGRAPH
<i>Power to tenant for life to mortgage for enfranchisement and equality of exchange</i>	321
<i>Form of mortgage under Settled Land Acts</i>	322
<i>Powers exercisable by other limited owners besides tenant for life..</i>	323
<i>How far powers exercisable when there is a trust for sale .. .</i>	324
<i>Trustees for purposes of the Settled Land Acts</i>	325
<i>Two trustees required to receive notice of intention to mortgage and to give receipt for loan</i>	326
<i>Power to tenant for life to substitute new lands for others, subject to an old charge</i>	327
<i>Express powers of trustees only exercisable with consent of life tenant ..</i>	328

SUB-SECTION (2).—*Under Improvement of Land Acts.*

<i>Power of limited owner to mortgage for improvements with sanction of Board of Agriculture</i>	329
<i>Improvements to which this power relates</i>	330
<i>Charge may include costs and interest.. .. .</i>	331
<i>Charge is created by absolute order of Board by way of rentcharge ..</i>	332
<i>Order conclusive evidence</i>	333
<i>Charge to be registered</i>	334

SUB-SECTION (2).—*Improvement of Lands Act (continued)*—

Paragraphs
321—322

	PARAGRAPH
<i>Costs of general public improvements may be charged on lands improved..</i>	335
<i>Charge commences from date of order and takes priority of most existing incumbrances</i>	336
<i>Interest on arrears of rent-charge</i>	337
<i>Assignment of such charges</i>	338
<i>Equities of successive owners of the land, inter se</i>	339
<i>Tenant of land paying charge may recover it.. .. .</i>	340
<i>Board may release land or apportion charge.. .. .</i>	341

SUB-SECTION (3).—*Under Copyhold Act, 1894.*

<i>Power to limited owner of copyholds to charge cost of enfranchisement on fee simple</i>	342
<i>Power to lord who is limited owner to charge cost of acquiring tenants' interest on fee simple</i>	343
<i>Form of charges under the Act.. .. .</i>	344
<i>Expenses of lord may also be charged.. .. .</i>	345
<i>Enfranchisement by tenant whose title is bad and who is subsequently evicted</i>	346
<i>Mortgagee enfranchising copyhold or redeeming rent-charge under the Act may add outlay to his security</i>	347
<i>Form and effect of certificate of charge by the Board.. .. .</i>	348

SUB-SECTION (4).—*Under Land Tax Redemption Acts.*

<i>Persons with limited interests may mortgage or grant rentcharges for redemption of land tax</i>	349
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SUB-SECTION (1).—*Under Settled Land Acts.*

321. By s. 18 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), where money is required for *enfranchisement* (which includes the acquisition of the freehold reversion of settled leaseholds (s)), or for *equality of exchange or partition*, a tenant for life may raise the same by mortgage of the settled land or any part thereof. And, by s. 47, the court may *sanction* a mortgage to be made by such person as the court may direct, for raising costs, charges, or expenses incurred under the Act.

By s. 11 of the Settled Land Act, 1890, these provisions are extended; and now, where money is required (*i.e.*, reasonably required having regard to all the circumstances (t)), for the purpose of *discharging an incumbrance* on the settled land, or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction, by mortgage of the settled land, or any part thereof.

322. All mortgages may be made by conveyance of the fee simple, or other estate or interest the subject of the settlement,

Power to tenant for life to mortgage for enfranchisement or equality of exchange or partition, and for paying off incumbrances.

Form of Mortgage.

(s) *Re Bruce, Halsey v. Bruce*, [1905] 2 Ch. 372.
(t) *Re Clifford, Scott v. Clifford*, [1902] 1 Ch. 87.

Paragraphs
322—324

or by creation of a term of years in the settled land, or any part thereof, or otherwise; and the money so raised is to be considered capital money, and may be paid or applied accordingly (*u*).

Powers
extended to
other limited
owners
besides tenant
for life.

323. The Act not only applies to persons who are for the time being, under a settlement, beneficially entitled to possession of settled land for life, but also to the following persons (*x*), viz. :—

- (i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown; but not including such a tenant in tail where the land, in respect whereof he is so restrained, was purchased with money provided by Parliament in consideration of public services :
- (ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event :
- (iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown :
- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent :
- (v.) A tenant for the life of another, not holding merely under a lease at a rent :
- (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts, or other purposes :
- (vii.) A tenant in tail after possibility of issue extinct :
- (viii.) A tenant by the curtesy :
- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event ;
- (x.) A tenant by the curtesy, whose estate is to be deemed to have arisen under a settlement made by his wife (*y*).

How far
powers
exercisable

324. By s. 63 of the Act of 1882 (as amended by s. 7 of the Act of 1884), persons entitled for life to the income until sale of

(*u*) Act of 1882, ss. 18 and 47, and Act of 1890, s. 11.

(*x*) Act of 1882, s. 58.

(*y*) Act of 1884, s. 8.

land settled in trust for sale, and to the income of the purchase-money afterwards, may, *with the consent of the court*, exercise the powers of a tenant for life under the Acts. It is apprehended that the distinction between this section and section 58, par. (ix.) is, that the latter refers to a power of sale, and the former to an imperative and intermediate trust for conversion.

Paragraphs
324—327

when there
is a trust for
sale.

325. It will be perceived that money borrowed on mortgage under these Acts is capital money ; and consequently, by s. 22, it must be paid by the lender, not to the tenant for life, but to trustees who are “ trustees for the purposes of the Acts,” or, at the discretion of the tenant for life, into court. Trustees for purposes of the Acts are :—

Trustees for
purposes of
the Acts.

- (a) Persons appointed for that express purpose, either by the settlement (z), or by the court (a) ;
- (b) Persons with power of sale of the settled land, or with power of consent to, or approval of the exercise of such a power of sale (b) ;
- (c) Persons who are, for that time being, under the settlement, trustees with power of, or upon trust for sale of any other land comprised in the settlement, and subject to the same limitations as the land to be sold ; or with power of consent to, or approval of, the exercise of such a power of sale ; or, if there be no such persons, then
- (d) Persons who are, for the time being, under the settlement, trustees with future power of sale, or under a future trust for sale of the land, or with power of consent to, or approval of, the exercise of such a future power ; and whether the power or trust takes effect in all events or not (c).

326. Unless the settlement otherwise directs, there must be at least two such trustees, not merely to give a receipt for the money advanced (d), but also to receive from the tenant for life notice of his intention to mortgage or charge the land, which notice he is by s. 45 of the Act of 1882 bound to give in a prescribed manner. This notice, in the case of a mortgage or charge, must, it is conceived, be notice of each specific transaction contemplated (e), as s. 5 of the Act of 1884, which permits of a general intention to exercise the powers of the Acts in relation to sales, exchanges, partitions, and leases, does not extend to mortgages or charges. However, a lender dealing in good faith with the tenant for life, is not concerned to inquire respecting the giving of any such notice (f).

Two trustees
required to
receive notice
of intention
to mortgage.

327. The Settled Land Act, 1882, also enables tenants for life

Power to
tenant for

(z) Act of 1882, s. 2 (8).

(a) *Ib.* s. 38.

(b) *Ib.* s. 2 (8).

(c) Act of 1890, s. 16.

(d) Act of 1882, s. 39.

(e) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(f) Act of 1882, s. 45 (3).

Paragraphs
327—329

life to
substitute
new lands as
security for
old charges.

to sell, partition, and exchange lands, and also to purchase other lands with the proceeds of any sale; and it is provided (*g*) that land acquired by purchase, or in exchange, or on partition, may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

It is also provided that where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was, before the exchange or partition, subject to the charge. On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

These provisions extend and apply, as far as may be, not only to lands, but also to mines and minerals, and to easements, rights and privileges over and in relation to land.

Express
powers of
trustees only
exercisable
with consent
of life tenant.

328. Any power conferred for any of the above purposes by the settlement on the trustees, can only be exercised with the consent of the tenant for life (*h*). It is nevertheless the opinion of a very eminent conveyancer and commentator (*i*) on these Acts, that “to the exercise of a power given to trustees for raising *charges* by mortgage or sale, the consent of the tenant for life would not be necessary. The trustees would have a title paramount to that of the tenant for life, and he could not prevent the raising of the charges.” . . . “The case would be similar to that of two contracts by two successive mortgagees, each with a power of sale.”

SUB-SECTION (2).—*Under the Improvement of Land Acts.*

Power of
limited
owners to
mortgage for
improvements.

329. Although the Settled Land Acts permit of the application of the proceeds of *sales* for the purpose of effecting improvements, they do not permit of money being *borrowed* on mortgage for such purposes. This, however, can be effected in many cases under older statutes with the consent of the Board of Agriculture. Thus, by the statute 3 & 4 Vict. c. 55, subsequently supplanted by the statute 8 & 9 Vict. c. 56, tenants for life and other limited owners were empowered, with the leave of the Court of Chancery, to make permanent improvements by way of draining lands, and to charge

(*g*) Section 24 (4) to (7).

(*h*) Settled Land Act, 1882, s. 56.

(*i*) Mr. Wolstenholme, *The Conveyancing and Settled Land Acts*, 9th ed., 1905, p. 415.

the money expended in making such improvements, upon the inheritance with interest. Paragraphs
329—330

In 1864, still larger powers of improvement of land were given to limited owners by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114). By this Act a landowner is defined to mean “the person who shall be in the actual possession or receipt of the rents or profits of any land, whether of freehold, copyhold, or customary or other tenure, except where such person shall be tenant for life or lives holding *under a lease* for life or lives not renewable, or shall be a tenant for years holding under a lease for life or lives not renewable, or shall be a tenant for years holding under a lease or an agreement for a lease for a term of years not renewable, whereof less than 25 years shall be unexpired at the time of making any application under the Act, without regard to the real amount of the interest of any person so excepted. And in the case where the person in the actual possession or receipt of the rents or profits of any land shall fall within any of the above exceptions, then the person who, for the time being, shall be in the actual receipt of the rent payable by the person so excepted (unless he shall also fall within such exceptions), shall, jointly with the person who shall be liable to the payment thereof, be deemed for the purposes of the Act to be the owner of such lands.”

By s. 24 all husbands, guardians, committees, feoffees, trustees, executors, and administrators are to represent their wives, wards, lunatics, etc.

The Act extends to corporations (s. 10); but where the land is held in right of any church, chapel, or other ecclesiastical benefice, the consent of the bishop is in every case essential (*k*).

330. This Act (as extended by the Limited Owners Residences Improvement Act (1870) Amendment Act, 1871, and s. 30 of the Settled Land Act 1882), enables the Board of Agriculture (*l*) (formerly the Land Commissioners), when satisfied that the improvements hereafter mentioned or part thereof *have been properly executed*, to execute a charge on the inheritance of the land, or some sufficient part thereof, for the sum, by the provisional or other sanctioning order, expressed to be chargeable in respect of any of the following improvements (or for a proportionate part thereof if only part of them have been executed), together with interest, and the amount which shall have been paid in respect of the purchase of, or of any easement or right affecting adjoining lands, with interest, viz. :—

Improvements to which power conferred by Improvement of Land Act, 1864, applies.

1. The drainage of land, and the straightening, widening, deepening, or otherwise improving the drains, streams, and water-courses of any land (*m*) :

(*k*) Section 20, and see also 47 & 48 Vict. c. 67.

(*l*) 52 & 53 Vict. c. 30, s. 2.

(*m*) Act of 1864, s. 9.

Paragraph
330

2. The irrigation and warping of land (*n*) :
3. The embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams, in a permanent manner (*o*), and the construction of groynes, sea walls, and defences against water (*p*) :
4. The inclosing of lands, and the straightening of fences, and re-division of fields (*n*) :
5. The reclamation of land, including all operations necessary thereto, and dry warping (*n*) :
6. The construction of drains, pipes, and machinery for the supply and distribution of sewage as manure (*q*) :
7. The making of permanent farm roads, private roads, roads or streets in villages or towns, and permanent tramways and railways and navigable canals or docks, for all purposes connected with the improvement of the estate (*n*) :
8. The clearing, trenching, and planting of land (*n*) :
9. The erection of cottages for labourers, farm servants, and artisans, employed on the settled land or not, farmhouses and other buildings required for farm purposes, and the improvement of, and addition to, labourers' cottages, farmhouses, and other buildings for farm purposes, already erected, so as such improvements or additions be of a permanent nature (*n*) ;
10. Planting for shelter (*r*) :
11. The constructing or erecting of any engine-houses, water-wheels, saw mills, scutch mills, or kilns, and other mills, or bridges, or which will increase the value of any lands for agricultural purposes or as woodland or otherwise (*n*) :
12. The constructing or erecting of any reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for the supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption (*s*) :
13. The construction or improvement of jetties or landing places on the sea coast, or on the banks of the navigable rivers or lakes, for the transport of persons, cattle, sheep, or any agricultural stock and produce, and of lime, manure, and other articles and things for agricultural purposes, and of minerals and other things required for mining purposes (*n*) ;

(*n*) Act of 1864, s. 9.

(*o*) Improvement of Land Act, 1864, s. 9, and Settled Land Act, 1882, ss. 25 and 30.

(*p*) *Ib.*, and see *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541.

(*q*) Settled Land Act, 1882, ss. 25 and 30.

(*r*) *Ib.*

(*s*) Settled Land Act, 1882, s. 25 (xiii). This seem to supersede the more restricted provisions of 40 & 41 Vict. c. 31, and also some of the provisions of section 9 of the Act of 1864 as to water.

provided that the board shall be satisfied that such works will add to the permanent value of lands to be charged to an extent equal to the expense thereof.

14. The erection of a mansion house, and such other usual and necessary buildings, outhouses and offices as are commonly appurtenant thereto, and held and enjoyed therewith, and the completion of any mansion and such appurtenants already erected, and the improvement of and addition to any house which is capable of being converted into a mansion house suitable to the estate on which the same stands, so as such improvement or addition be of a permanent nature (provided that such mansion house so erected or enlarged or converted is suitable to the estate on which it stands as a residence for the owner of such estate, and provided the amount charged is limited to two years' net rental of the settled land) (*t*) :
15. The making of markets and market places :
16. The making of streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land :
17. The making of sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid :
18. The sinking of trial pits for mines, and other preliminary works necessary or proper in connection with development of mines :
19. The reconstruction, enlargement, or improvement of any of the above works :
20. Any operation incident to or necessary or proper in the execution of any of such of the above works as are authorized by the Settled Land Act, 1882, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (*u*).

The court has no jurisdiction to sanction the raising of money for any other kind of improvements, however desirable, except in cases amounting to salvage (*x*).

331. The board can, at the request of the landowner (*y*), include in the charge, the expenses of the application to the commissioners, Charge may include expenses and interest.

(*t*) The Limited Owners Residences Act (1870) Amendment Act, 1871, 34 & 35 Vict. c. 84, s. 3.

(*u*) Settled Land Act, 1882, s. 25.

(*x*) *Re Montagu, Derbishire v. Montagu*, [1897] 2 Ch. 8.

(*y*) See definition, s. 8 of Act of 1864; *Landowners, etc., Drainage and Inclosure Co. v. Ashford*, 16 Ch. D. 411.

Paragraphs
331—335

or of his contract relating to the execution of the improvements ; or to the advance of money for their execution ; and interest not exceeding 5*l.* per cent. per annum on all payments forming part of the principal, from the dates thereof to that of the absolute order, but so as no interest be allowed on any such payments for more than six years ; provided that the total amount of principal shall not exceed that to which the inheritance or fee of the lands improved will be directly benefited by the improvements (s. 50).

Charge
created by
absolute
order by way
of rent-
charge.

332. Every charge is to be created by an absolute order, and by way of rent-charge, payable half-yearly, for the term of years fixed by the sanctioning order ; the first payment to be six months after the time when the works were executed to the satisfaction of the board. The payment for each half-year is to be expressed to be, as to part, a repayment of a certain amount of principal money, and as to the remainder a payment of interest, and is to be stamped as a mortgage for a like amount, and a copy authenticated by the seal of and to be kept by the board, shall be evidence of the contents and purport of the absolute order (s. 51).

The charges are to be according to the form in the schedule, or as near thereto as circumstances will admit (s. 52).

Absolute
order
conclusive
evidence of
charge.

333. The execution of the absolute order by the board is to be conclusive evidence, in all courts, and for all purposes, of the validity of the charge expressed to be made, and no inquiry is to be permitted into the title or estate of the landowner, or the due performance of anything required to be done by the Act, or as to any other matter upon which the validity of the charge might, but for this enactment, have depended (s. 55).

Charge to be
registered in
land
registry.

334. A memorial of the absolute order creating the rent-charge in England or Wales is to be registered at the office of the Land Registry in England, and in Ireland in the deed and will registry there, as mentioned in the Act.

Costs of
general
improve-
ments may
be charged
on lands
improved.

335. Where the costs of any public or general improvements are authorized to be charged upon the inheritance of the lands improved (z), any landowner who shall have been assessed and shall have become liable for any such charge in respect of his land, may apply to the board to sanction the charging of the money so assessed upon the land in respect of which the landowner shall have been so assessed, and the board may, after the money shall have been paid by the landowner, charge the same by an absolute order upon the inheritance or fee of the land in respect of which the assessment

(z) Under the Private Street Works Act, 1892, tenants for life and other limited owners are empowered, without any sanction, to charge the expenses authorized to be imposed by that Act on the inheritance, repayable, nevertheless, within twenty years

was made and paid, or so much thereof as the commissioners will sanction, with interest (s. 57).

Paragraphs
335—338

Such absolute order and charge may be in any form, and for any term permitted by the Act, which applies in like manner as if the order and charge were made in respect of improvements on the land executed under the Act; and the board may charge the land with the costs, charges, and expenses of the application and order, or any contract connected therewith, as under s. 50 (**331**), respecting works executed under the Act (s. 58).

336. From the date of the absolute order, the grantee has a charge upon the lands for the principal money from time to time undischarged, by payment of the rent-charge with interest at the dates expressed; and with priority over every other then existing and future charge and incumbrance affecting the lands or estates and interests, whether created under the powers of any Act of Parliament or otherwise, except quit rents, crown rents, chief rents, feu duties, ground annuals, and other charges incident to tenure, tithe commutation rent-charges, and teinds, charges under any Act authorizing advances of public money for improvement of land, and charges created under this Act, or of prior date created under any other existing Act authorizing the charging of lands with the expense of and incident to their improvement. Provided that if part only of the land charged is subject to a mortgage or other incumbrance, the charge created under the Act shall have priority only to the extent of a due proportion of such charge, when the same shall be ascertained under s. 68 (a).

Charge is from date of absolute order.
Priority of charge.

Every charge under the Act as regards the holder is to be deemed personal property, but every holder may direct by deed that it be re-united to, and merge in, the beneficial interest in the land (s. 60).

Charges to be personality, but may be merged.

337. If any rent-charge be in arrear, the arrear is not to bear interest for more than six months, but interest at 5*l.* per cent. in respect thereof is recoverable in the same manner as the sum in arrear. If, at the end of six months from the time of any payment falling into arrear, there shall not be on the land charged a sufficient distress to answer the said payment and interest, then the arrears of such payment shall bear interest at 5*l.* per cent. per annum till satisfaction; and such interest may be recovered in the same manner as the sum in arrear (s. 64).

Interest on arrears.

338. The person entitled to a rent-charge may assign it, by a deed duly stamped, which may be according to the form in the

Assignment of rent-charges.

(a) Sect. 59. Under similar words in the Lands Improvement Companies Act, 1855 (18 & 19 Vict. c. lxxxiv.), it was held, that the statutory security had priority as to its whole amount over another incumbrance with which part only of the land was charged, until an apportionment had been made. *Lands Improvement Co. v. Richmond*, 17 C. B. 145.

Paragraphs
338—340

schedule, or as near as may be, and shall vest both at law and in equity the charge, and all powers, authorities, rights, and remedies of the assignor, in the assignee, his successors, executors, administrators, and assigns, and notice of the assignment is to be sent to the board at their office in London (s. 65).

The Act does not provide for the registration of assignments.

Equities of
successive
owners
inter se.

339. The Act contains provisions for the discharge of the periodical payments by persons having limited interests, with a proviso that no person becoming entitled in possession to any estate or interest in land, shall be liable, as between himself and the persons entitled to the rent-charge, to pay any arrears of charge remaining unpaid at the time of his becoming so entitled in possession beyond two years' payment. And that the amount paid by any person in respect of such arrears, and any costs occasioned by non-payment thereof, shall be a debt from the person who ought to have paid the same, or from his estate, to the person who paid the same, and shall be recoverable accordingly (s. 66).

Tenant
paying charge
may deduct
it from rent.

340. The tenant of the land paying the charge is to be entitled to deduct the amount from his rent, except as to such part as he has agreed to be charged with during his occupation; and where the improvements include other lands, the board may declare in the absolute order, what part of the whole charge payable shall be payable by such tenant during his tenancy, in respect of probable improvement of the land included in his tenancy (s. 67).

If land charged under the Act, or under any Act authorizing the creation of charges by the board, is occupied in several holdings, or has become the property of several owners, or the owner is entitled under separate titles, or for distinct and separate interests, or is desirous to dispose of part of such land, or part only of such land is subject to any incumbrance, or for any other reason it is desirable that the charge should be apportioned, or a part of the land charged released therefrom, the board may, with the consent of the land owner or of any one of such separate owners, or of such mortgagee or incumbrancer, but with due notice to the grantee or assignee of the charge, or to the husband, guardian, tutor, curator, committee or trustee of such grantee or assignee, if under disability, or to such other persons as the board think right, release from such charge any part of the land charged, or apportion it on separate lands or on the part subject to the mortgage or incumbrance, and on the residue; but so that no apportioned charge shall be less than twenty shillings for each half-yearly payment, and so that no lands shall thereby be charged beyond the amount to which they have been durably benefited by the improvements (s. 68).

341. Every such apportionment or release is to be in the form given in the Act, and is to be registered and evidenced as in s. 56 (*b*), and such apportioned or released charges are to be recoverable out of the apportioned lands, or lands not released, as original charges under the Act (s. 70).

Paragraphs
341—346
Board may
release lands
or apportion
charge.

Where lands are charged by more than one absolute order, any order of apportionment or release, under the preceding sections, may comprise all or any number of rent-charges existing by virtue of such absolute orders (s. 71).

SUB-SECTION (3).—*Under Copyhold Act, 1894.*

342. Where an enfranchisement is effected under the Copyhold Act, 1894 (57 & 58 Vict. c. 46), the tenant, who is a limited owner, may charge the land enfranchised, with all money paid by him as compensation or consideration for the enfranchisement, and with his costs of the enfranchisement, and of the charge; or (with the lord's consent) he may give such a charge to the lord to secure his compensation (*c*). Moreover, where he gives land of his own instead of money, by way of compensation to the lord, he may charge the enfranchised land with such reasonable sum as the Board of Agriculture consider equivalent to the value of the land so given, and with the costs (*d*).

Power to
limited owner
of copyholds
to charge
cost of
enfranchise-
ment on the
fee simple.

343. Conversely, where a lord, being a limited owner, buys up a tenant's interest under the Act, he may charge the land purchased, and the manor, or any other land settled to the same uses, with the purchase-money and costs (*e*).

344. All such charges may be for a principal sum and interest (not exceeding 5 per cent. per annum) as may be by way of terminable annuity calculated on the same basis (*f*); and in either case may be created by deed by way of mortgage, or by a certificate of the board (*g*). Such charges are to have priority over all prior incumbrances whatsoever, except tithe rent-charge, and any charge having priority by statute (*h*).

Power to
lord who is
limited owner
to charge
costs of
acquiring the
tenant's
interest on
the fee
simple.

345. Any expenses incurred by a lord of a manor under the Act may be (*inter alia*) charged (either by deed or certificate), together with the expenses of the charge, on the manor, or any land settled to the same uses, or on any rent-charge made under the Act within the manor (*i*).

Form of such
charges.
Expenses of
lord may also
be charged.

346. If a tenant who enfranchises is afterwards evicted, he may claim, and shall have a charge on the land for the amount of

Enfranchise-
ment by
tenant whose

(*b*) Sect. 69. The reference in the Act is erroneously to s. 54.

(*c*) Act of 1894, Sect. 36 (1) and (4). (*g*) *Ib.* (6).

(*d*) *Ib.* (2) and (4).

(*h*) *Ib.* (7).

(*e*) *Ib.* (3) and (4).

(*i*) Sect. 37 (1).

(*f*) *Ib.* (5).

Paragraphs
346—349

the compensation money which he has paid, and so much of it as is not already charged on the land, with interest at 4 per cent. (*k*).

title is bad
and who is
evicted.

Mortgagee
enfranchising
or redeeming
rent-charge
to add the
outlay to his
security.

Form and
effect of
certificate of
charge.

347. If a mortgagee pays any compensation or expenses for enfranchisement under the Act or for redemption of a rent-charge created by the Act, he is to add his expenditure to his security (*l*).

348. The Act provides for the form of certificate of charge and transfers thereof, and declares that charges are not to merge in the freehold without an endorsed declaration that they are to do so (*m*), and also provides remedies for the recovery of such charges (*n*).

SUB-SECTION (4).—*Under the Land Tax Redemption Acts.*

Persons with
limited
interests may
mortgage or
grant rent-
charges for
redemption
of land tax.

349. By the Land Tax Redemption Act (42 Geo. 3, c. 116), for the purpose of redeeming land tax charged on hereditaments belonging to any persons not being bodies politic or corporate, or companies, feoffees, or trustees for charitable or other public purposes, the persons in possession or beneficially entitled to the rents, but not having the absolute estate or interest in the property (except tenants at rack rent and Crown tenants of the Duchy of Lancaster and Cornwall), are empowered to mortgage the lands in fee or for a term, (where they are not copyhold or of customary tenure), or to grant rent-charges to secure money raised for the redemption of the land tax (s. 51). Similar powers are given to committees and curators of lunatics or idiots, and to all executors and administrators, curators or trustees having authority to act for infants, minors, issue unborn, femmes covert, or other incapacitated persons (s. 53).

The securities are to be made under the authority and with the consent and approbation of the commissioners of the Treasury, certified by their signing and sealing the instrument (1 & 2 Vict. c. 58, s. 1).

Like powers of sale, mortgage and granting rent-charges are given to bodies politic or corporate, companies and trustees of feoffees for charitable and other public purposes (ss. 69, 76).

The Act (s. 123) also provides that where a limited owner redeems the tax he is to have a charge on the inheritance for the redemption money, with interest equal to the tax redeemed. And by section 126, where a landlord redeems the tax, and the tenant is liable to pay it, the latter must pay during his tenancy a correspondingly increased rent.

(*k*) Sect. 38.
(*l*) Sect. 39.

(*m*) Sect. 41, sub-sect. 6, and ss. 27—31.
(*n*) Sect. 41, sub-sect. 7, and ss. 27—31.

SECTION VIII.

Paragraphs
350—351

Of Securities upon Ecclesiastical Benefices.

	PARAGRAPH
<i>Power to incumbent to borrow for repairs, etc.</i>	350
<i>Mode of applying loans</i>	351
<i>Loan secured on profits of benefice</i>	352
<i>Power to colleges and other incorporated patrons to lend</i>	353
<i>Patrons who are under disabilities</i>	354
<i>Incumbent may be the lender</i>	355
<i>Mortgages for purchase of glebe lands</i>	356
<i>Glebe may be mortgaged to provide a parsonage</i>	357
<i>Borrowing for repairs from Queen Anne's Bounty</i>	358

350. In addition to the powers conferred by the Improvement of Land Act, 1864 (**329**), by "Gilbert's Act," and the Acts by which it has been amended and extended (*o*), incumbents of ecclesiastical benefices (and, in certain cases, the ordinary) can borrow at interest, the estimated necessary outlay (not exceeding three years' net income, less outgoings), of building or repairing, or adding to (*p*), the parsonage or offices, or of purchasing lands, not exceeding twelve acres, contiguous to or desirable to be used or occupied with the parsonage or glebe, or for building offices, stables or outbuildings or fences necessary for the occupation or protection of such parsonage, or for restoring, rebuilding or repairing the fabric of the chancel (where the incumbent is liable to sustain it), or for building, improving, enlarging or purchasing any farmhouse or farm buildings, or labourers' dwellings, belonging to or desirable to be acquired for any farm or lands appertaining to such benefice. The money can, however, only be borrowed for the above purposes respectively and not for the purpose of paying for work already done (*q*).

351. The moneys borrowed are to be paid to a person or persons appointed in writing by the ordinary, patron and incumbent, the nominee giving a bond to the ordinary for its due application, and the nominee's receipt is a good discharge to the lender; a strict compliance with these provisions is essential to the validity of the mortgage (*q*). The nominee makes and sees to the execution of the contracts, and pays for them and accounts for the expenditure; and the surplus, if any, is applied, at the discretion of the ordinary and of the patron and incumbent, (or of one of them, with the ordinary), in further lasting improvements in buildings on the glebe, or in part discharge of the principal of the debt.

(*o*) 17 Geo. 3, c. 53, ss. 1, 2, 4, 6, 8; 1 & 2 Vict. c. 23, ss. 1, 2; 28 & 29 Vict. c. 69, s. 1; and see 5 & 6 Vict. c. 26, s. 13. As to apportionment of annual payment in case of avoidance, see 17 Geo. 3, c. 53, s. 7.

(*p*) See *Boyd v. Barker*, 4 Drew, 582; 5 Jur. (N.S.) 234.

(*q*) *Lidbetter v. Hatch*, [1907] 1 Ch. 404.

Paragraphs
352—357

Loan secured
on profits
of benefice.

352. The loan is secured by mortgage (of which a counterpart is to be executed, and which is to be registered in the registry of the diocese) of the glebe and profits of the benefice for thirty-five years, or till payment of the loan with interest and costs; one-thirtieth of the principal being repaid annually after the first year, with the interest of the repaid principal; for the recovery of which powers of distress and sale are given to the mortgagee when principal and interest are in arrear for forty days, and a power of sequestration, having preference over all other sequestrations, is vested in the ordinary, for recovery of principal and interest, and, in case of the neglect of the incumbent, to insure the buildings (*r*).

Loans may be made under the Acts by the Governors of Queen Anne's Bounty without interest, where the annual value of the benefice does not exceed 50*l.* (*s*).

Power to
colleges and
other
incorporated
patrons to
lend.

353. Colleges and halls of the Universities of Oxford and Cambridge, or other corporate bodies, may lend money for the purposes of the Acts without interest, where the benefice for which the loan is raised is under their patronage (*t*).

Disabilities.

354. Patrons of livings, who may be minors, idiots, lunatics, or under coverture, may be bound by the acts of their guardians, committees, or husbands (*u*).

Incumbent
may be the
lender.

355. The mortgage is good, though the money be advanced by the incumbent himself at a moderate rate of interest (*x*). But it may not be advanced by a person whose duty it is to see that the provisions of the Act are properly carried out for the benefit of the living (*y*).

Mortgages
for purchase
of glebe.

356. By another Act (*z*) powers are given to incumbents to purchase additional land for glebe; and for that purpose, to make limited mortgages of the profits of the benefice.

Bishop may
raise money
by mortgage
of glebe and
profits of
benefice.

357. By the Benefices Plurality Act (*a*), upon or at any time after the avoidance of any benefice, if it be reported in writing by commissioners appointed by the bishop, or any three of them, that there is no fit residence within the benefice, that the annual profits exceed 100*l.*, and that a fit house can conveniently be provided on the glebe, or on land which can be conveniently procured, the bishop is to obtain an estimate of the cost, and by a mortgage of

(*r*) 17 Geo. 3, c. 53, ss. 3, 6; 1 & 2 Vict. c. 23, s. 15.

(*s*) 17 Geo. 3, c. 53, s. 12; 1 & 2 Vict. c. 23, s. 4.

(*t*) 17 Geo. 3, c. 53, s. 13; 1 & 2 Vict. c. 23, s. 5.

(*u*) 17 Geo. 3, c. 53, s. 14.

(*x*) *Boyd v. Barker*, 4 Drew, 582; 5 Jur. (N.S.) 234.

(*y*) *Greenlaw v. King*, 3 Beav. 49; 4 Jur. 622; affirmed 5 Jur. 18.

(*z*) 55 Geo. 3, c. 147, ss. 6, 7.

(*a*) 1 & 2 Vict. c. 106; and see 5 & 6 Vict. c. 26, s. 13.

the glebe and profits, to raise the amount (after deducting the value of the saleable materials), not exceeding four years' net produce of the benefice, after deducting outgoings, except the salary of the assistant curate where necessary. The statute also contains provisions as to the length of the term, the liability to payment, the remedies in case of non-payment, and application of the money raised, corresponding with the provisions of Gilbert's Act (b).

Paragraphs
357—358

Moneys received from representatives of any former incumbent, and not laid out in repairs, are to be applied in part of the payments under the estimate; and all money to be recovered or received after the completion of and payment for the buildings, is to be applied in payment of the principal of the mortgage debt: or, in case of discharge thereof, shall be paid to the bishop's nominee, to be expended in additional buildings or improvements upon the glebe, to be approved by the bishop; and in the meantime, or in case such buildings are not necessary, shall be laid out in government or other good securities, and the interest thereof paid to the incumbent for the time being (c).

Application
of moneys
received for
dilapidations.

358. By the Ecclesiastical Dilapidations Act, 1871 (d) (for providing for repairs to buildings which ecclesiastical persons are bound to keep in repair), the new incumbent of a benefice may borrow, and the governors of Queen Anne's Bounty may lend, upon the request and with the consent of the bishop and patron, upon the security of the possessions of the benefice, (1) the whole or any part of the cost of the repairs of the buildings of the benefice stated in the order to be made under the Act by the bishop; and (2) such sum as the governors shall think fit in respect of costs and expenses.

Power to
new incum-
bents to
borrow for
repairs.

The security may be in the form (e) contained in the first schedule to the Act, or in such other form as the governors may approve. The certificate of their treasurer that any sum has been placed to the credit of the account mentioned in the certificate, is conclusive evidence of the fact; and the governors have the same remedies for the recovery of the sums due upon the security against the incumbent and his successors, and the property comprised in the security, as if the advance had been made for repairing and rebuilding under the Acts 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 7 Geo. 4, c. 66; 1 & 2 Vict. c. 23; 28 & 29 Vict. c. 69; the powers in which, and in any Act or Acts amending the same, are exercisable, either separately or concurrently, with the powers of the Act of 1871. The receipt of the treasurer is a discharge for all moneys paid to the governors under the provisions of the Act.

Before lending on the security of the possessions of the benefice, Incumbent to furnish

(b) 1 & 2 Vict. c. 106, ss. 62—68.

(c) Sect. 69.

(d) 34 & 35 Vict. c. 43, s. 38. And as to the form and provisions of the security, see Ecclesiastical Dilapidations Act, 1872, c. 96.

(e) 34 & 35 Vict. c. 43, ss. 62, 73; Act of 1872, s. 1.

Paragraph
358
account of
annual
profits.

Registration
of securities,
&c.

the governors are (f) to require from the incumbent an account in writing signed by him, and verified by his oath or statutory declaration, of the annual profits of the living, and to procure the consent in writing of the bishop and patron under their hands, or, where the patron is a corporation aggregate, under its seal.

The provisions (g) of the several Acts just mentioned, and of the Acts referring to or amending the same, with respect to the registration of mortgages and to the proportioning of payments in the case of death or avoidance, and to stamps and fees of officers, and to the priority of sequestrations, apply to securities made under the authority of the Act of 1871.

When the income of a living, so mortgaged, has become reduced, the governors are now empowered to extend the time for repayment of the debt (h).

As to payment off of mortgages on sale of incumbered glebe land, see 51 & 52 Vict. c. 20, s. 6.

SECTION IX.

Of Securities by Private Trustees and Executors. Trustees in Bankruptcy, and Charitable Trustees.

	PARAGRAPH
<i>Power of personal representatives under the Land Transfer Act, 1897</i> ..	359
<i>Former law.—Statutory power to trustees to mortgage where debts, etc., charged on real estate</i>	360
<i>Executors could mortgage real estate where testator's estate not devised</i> ..	361
<i>Mortgagees under statute not bound to enquire whether power duly exercised</i> ..	362
<i>Mortgagee not bound to enquire as to existence of debts within 20 years</i> ..	363
<i>Rule in Corser v. Cartwright</i>	364
<i>Although land now assets for payment of debts, mortgagee from heir or devisee not concerned to see to their payment</i>	365
<i>Where gross sum raisable out of rent, it may be raised by mortgage</i> ..	366
<i>Former powers of trustees to mortgage for equality of exchange, etc., transferred to tenant for life</i>	367
<i>Power to mortgage sometimes implied from power to sell or from power of management</i>	368
<i>Court will not interfere with trustee's discretion</i>	369
<i>Formerly doubtful whether fiduciary mortgagor could give power of sale</i> ..	370
<i>Conveyance absolute in form, but really only security, does not import power of sale</i>	371
<i>Executor might always mortgage personal estate and may now mortgage realty</i>	372
<i>Charge of debts confined to testator's debts at death</i>	373
<i>Mortgagee from executor not bound to enquire as to necessity for mortgage</i> ..	374
<i>Mortgage by executor for his private debt</i>	375
<i>Purchaser from executor protected by court</i>	376
<i>Distinction between respective duties of purchasers from executors and from trustees</i>	377
<i>Mortgages by trustees in bankruptcy</i>	378
<i>Mortgages by charitable trustees</i>	379

359. Under the Land Transfer Act, 1897, the personal representatives of persons dying after the 31st December, 1897, have (but only when acting together) the same power of mortgaging the freehold lands of the deceased and (*semble*) copyholds in which he had merely an equitable interest; as if such lands were chattels real, as to which see *infra* (372 *et seq.*). In the case of persons dying before the 1st January, 1898, the law was as stated *infra* in sections 360–366.

Paragraphs
359—360

Power of personal representatives under the Land Transfer Act, 1897.

360. Before 1859, in the absence of a charge of debts in the will of the deceased, there was no power, either in his personal representative, or the trustees of his real estate, to mortgage the latter for payment of debts or personal and testamentary expenses without the assistance of the Court. If debts or legacies or testamentary expenses were expressly or impliedly charged on real estate, and the mode of raising the money was not prescribed, the executor and devisee in fee (if any), even where the latter was merely a trustee, could raise the money by mortgage or sale in exercise of an implied power (*i*), without obtaining a decree (*k*). But of course where the legal fee simple was not devised to some person *sui juris*, that could not be done. In order to obviate these difficulties, it was, in 1859, enacted by Lord St. Leonards Act (*l*), that where by any will coming into operation after the 13th August, 1859, the testator

Former law.

Statutory power to trustees to mortgage where debts, &c., charged on real estate.

(1) Shall have charged his real estate (*m*), or any specific portion thereof, with the payment of his debts, or of any legacy or other specific sum of money, and

(2) Shall have devised the estate so charged, to any trustee or trustees for the whole of his estate or interest therein, and

(*i*) *Ball v. Harris*, 4 Myl. & Cr. 264; *Eland v. Eland*, 4 Myl. & Cr. 420; *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Eidsforth v. Armstead*, 2 K. & J. 333; *Corser v. Cartwright*, L. R. 7 H. L. 731. As to the cases in which the implied power arose, *id.*; and *Storry v. Walsh*, 18 Beav. 559; *Wrigley v. Sykes*, 21 Beav. 337; *Colyer v. Finch*, 5 H. L. C. 922; *Hodkinson v. Quinn*, 1 Johns. & H. 303; *Doe d. Jones v. Hughes*, 6 Ex. 223; but see observations in *Robinson v. Lowater*, 5 De G. M. & G. 272.

(*k*) *Earl of Bath v. Earl of Bradford*, 2 Ves. sen. 587.

(*l*) 22 & 23 Vict. c. 35, ss. 14–16.

(*m*) As to what words in a will operate to create a charge of debts on real estate the general rule is that whenever a testator directs in terms, however general, that his debts shall be paid (not saying by his executors) and afterwards disposes of his real estate, the latter is charged in aid of the personality. See *Clifford v. Lewis*, 6 Madd. 33; *Ball v. Harris*, 8 Sim. 485; 4 Myl. & Cr. 264; *Shaw v. Borrer*, 1 Keen, 559; *Harding v. Grady*, 1 Dru. & War. 430. If the direction be that the executors pay debts there is no charge thereby created on real estates unless real estate be expressly devised to them either beneficially or in trust. See *Cook v. Dawson*, 3 De G. F. & J. 127; 29 Beav. 123. *Re Tanqueray-Willlaume and Landau*, 20 Ch. D. 465; *Re De Burgh Lawson*, 41 Ch. D. 568; *Re Bailey, Bailey v. Bailey*, 12 Ch. D. 268. So, a gift of real and personal estate, “after payment of debts,” charges both; *Withers v. Kennedy*, 2 Myl. & K. 607; *Moores v. Whittle*, 22 L. J. Ch. 207; and when debts are directed to be paid, and there is a gift of the residue of real and personal estate together, the realty is charged. *Greville v. Browne*, 7 H. L. C. 689; *Gainsford v. Dunn*, L. R. 17 Eq. 405; *Re Bailey, Bailey v. Bailey*, *supra*. For illustrations of and exceptions to these rules, see cases collected in Theobald on Wills, 7th ed., 1908, pp. 832, *et seq.*

Paragraphs
360—362

(3) Shall not have made any express provision for the raising of such debt, legacy, or sum of money, out of such estate, It shall be lawful for the said devisee or devisees in trust, and for every person in whom the devised estate shall be vested by survivorship, descent or devise, or who may be appointed under any power in the will, or by the court, to succeed to the trusteeship vested in such devisee or devisees in trust, and notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money by a sale or *mortgage* of the said hereditaments or any part thereof, or partly in one mode or partly in the other, and in case of mortgage, reserving such rate of interest and fixing such period or periods of repayment as the person or persons executing the same shall think proper (*n*).

Executors
could
mortgage
where
testator's
estate not
devised.

361. By section 16 it was enacted that if any testator, who shall have created such a charge as is described above, shall not have devised the hereditaments charged, so that his whole estate and interest therein shall become vested in any trustee or trustees, then, the executor or executors for the time being named in such will, or in whom the executorship shall for the time being be vested, shall have the same or the like power of raising the said moneys as is vested by the Act in the devisee or devisees in trust. But any sale or mortgage under the Act shall operate only on the estate and interest, whether legal or equitable, of the testator; and shall not render it unnecessary to get in any outstanding subsisting legal estate. The word "executors" is strictly construed, and statutory power does not extend to administrators (*o*). And where the beneficiaries cannot agree whether the money shall be raised by sale or mortgage, the wishes of those whose interests are prior in time will generally be followed (*p*).

Mortgagees
not bound
to enquire
whether
power duly
exercised.

362. The above enactments are practically now only applicable to existing mortgages; but as they may still affect the validity of titles, it is necessary to make some observations upon them. Purchasers (*q*) or mortgagees were not bound to enquire whether the powers conferred by any of the provisions had been duly and correctly exercised by the person or persons acting in virtue thereof. The powers did not apply to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, and do not affect the power of any such devisee or devisees to sell or mortgage as he or they might have done before the passing of the Act. But they did apply to a devise

(*n*) 22 & 23 Vict. c. 35, ss. 14, 15.

(*o*) *Re Clay & Tetley*, 16 Ch. D. 3.

(*p*) *Metcalfe v. Hutchinson*, 45 L. J. Ch. 210.

(*q*) 22 & 23 Vict. c. 35, s. 17.

to one for life with remainders over ; and in such a case where there are no trustees the executors could sell or mortgage (r).

An executor who was also a devisee, and executed a mortgage “as beneficial owner,” did not thereby invalidate the mortgage as a mortgage by him *qua* executor under the statutory power (s). But where a person who was executor pretended that he was his own testator, and mortgaged the property under the name of that testator, the mortgage was not good (t).

If the estate were charged generally with the payment of debts, or of debts and legacies (the rule being otherwise where the charge was for payment of debts due to particular persons (u)), it was held that the charge amounted to a declaration that the persons responsible for payment of the debts were entrusted with the receipt and application of the money, and the mortgagee was free from obligation even if there were no debts, or they were discharged at the time of the mortgage (x). The presumption was that the money was raised for the payment of the debts ; and this presumption was not displaced merely by the circumstance that the executor and devisee of the estates charged had included in the security property which formed no part of the testator’s estate (y).

363. The mortgagee or other person making the advance, or buying *bonâ fide*, under the belief that the money would be properly applied, and without notice of an intended improper application, was justified in taking the word of the executor or trustee as to the necessity for raising it, where there were no circumstances which might create a reasonable doubt as to the motive or objects for doing so (z). And if the mortgagee or the purchaser did not know that the debts had been paid he was not bound (if a mortgagee) or entitled (if an absolute purchaser) to require proof that any remained unpaid, if the sale or mortgage was made at any time within twenty years from the testator’s death ; and the rule was equally applicable to equitable

Mortgagee not bound to enquire as to existence of debts within 20 years.

(r) *Re Wilson, Pennington v. Payne*, 54 L. T. 600.

(s) *Re Roulston’s Trust*, 21 L. R. Ir. 503 ; but cf. *Re Queale*, 17 L. R. Ir. 361.

(t) *Per KEKEWICH, J., Scott v. Alvarez*, [1895] 1 Ch. at p. 625 ; cf. *Drew v. Earl of Norbury*, 3 Jo. & Lat. 267, 284.

(u) *Elliot v. Merriman*, Barn. Ch. 78 ; *Walker v. Flamstead*, 2 Ken. pt. 2, p. 57.

(x) *Per* Lord St. LEONARDS in *Stroughill v. Anstey*, 1 De G. M. & G. 635. See *Johnson v. Kennett*, 3 Myl. & K. 624 ; *Page v. Adam*, 4 Beav. 269 ; *Forbes v. Peacock*, 11 Sim. 152 ; 1 Ph. 717 ; 11 Mee. & W. 639 ; *Robinson v. Lowater*, 5 De G. M. & G. 272 ; 18 Jur. 363 ; *Bolton v. Stannard*, 4 Jur. (N.S.) 576 ; see *Cook v. Dawson*, 29 Beav. 123 ; 3 De G. F. & J. 127.

(y) *Barrow v. Griffith*, 11 Jur. (N.S.) 6. As to how each estate is to bear such a charge, see *Rochejoucauld v. Boustead*, [1898] 1 Ch. 550.

(z) *Hartland v. Murrell*, 27 Beav. 204 ; *Farhall v. Farhall*, L. R. 7 Eq. 286. But it is *aliter* where the lender knows, or ought to know, that the executor is acting *ultra vires*, e.g., where an executor wrongfully took shares in a building society, and mortgaged his testator’s estate to the society not only for his testator’s debt, but also to secure his own personal liability on the shares, the mortgage was held good, *qua* the testator’s debt, and bad *qua* the executor’s liability. *Thorne v. Thorne*, [1893] 3 Ch. 196.

Paragraphs
363—365

as to legal estates or interests (a). Where, however, money (b) was proposed to be raised on freeholds after a great lapse of time, and without apparent reason, the mortgagee was bound to make enquiry (c). But this did not apply to the case of a personal representative selling or mortgaging *leaseholds* (d), nor (it is conceived) does it apply to a personal representative mortgaging freeholds where the owner has died since 1897. A mortgage made by a trustee, under colour of a charge, seventeen years after the death of the testatrix, *and under circumstances which showed that the payment of her debts could not have been the whole object*, was set aside as against the transferee. But a sale made twenty-seven years from the death, where there were no such circumstances, was supported (e). But where legacies are charged on real estate a purchaser or mortgagee from the *devisee* alone must see that they have been paid (f).

Rule in *Corser*
v. *Cartwright*.

364. Where the devisee of an estate, whether as trustee or beneficially, was also the executor, it was unnecessary for the mortgagee's safety that the raising of the money should be inquired into or even recited or stated in the mortgage; nor was it necessary that the mortgage should be expressed to be made by the devisee *qua* executor (g).

Although
land
now assets
for payment
of debts,
purchaser
from heir or
devisee not
concerned
with their
payment.

365. Notwithstanding that the simple contract debts of deceased debtors become by the effect of the statute, 3 & 4 Will. 4, c. 104, payable out of the land in the event of the personal estate proving insufficient, yet there is no lien or charge on the land under that Act until a judgment has been obtained by the creditor (h). Consequently, a purchaser or mortgagee from the heir or devisee, without notice that the sale or mortgage was made for the purpose of defeating creditors, might assume that it was required for the due administration of the estate, and was not bound to see to the application of the purchase- or mortgage-money (i). And for this purpose an equitable tenant for life under a will is a devisee, so that his alienee for value, before action brought, will have priority over the testator's creditors (k).

(a) *Graham v. Drummond*, [1896] 1 Ch. 968.

(b) *Corser v. Cartwright*, L. R. 7 H. L. 731; *Re Tanqueray-Willlaume and Landau*, 20 Ch. D. 465.

(c) *Stroughill v. Anstey*, 1 De G. M. & G. 635; see *Colyer v. Finch*, 5 H. L. C. 922.

(d) *Re Whistler*, 35 Ch. D. 561; and *Re Venn & Furze's Contract*, [1894] 2 Ch. 101.

(e) *Burt v. Trueman*, 6 Jur. (N.S.) 721; 29 L. J. Ch. 902; *Sabin v. Heape*, 27 Beav. 553.

(f) *Bank of Bombay v. Suleman Sonji*, L. R. 35 Ind. App. 130; 99 L. T. 532.

(g) *Corser v. Cartwright*, *supra*; *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356.

(h) *Re Mocn, Holmes v. Holmes*, [1907] 2 Ch. 304.

(i) *Kinderley v. Jervis*, 22 Beav. 1.

(k) *Re Atkinson, Procter v. Atkinson*, [1908] 2 Ch. 307.

366. Where there was an express direction to raise the charge, if the trusts of the will required that a gross sum should be raised, it might be raised out of the estate itself, although the rents and profits be the only specified fund (*l*); and upon this principle fines for the renewal of leases for lives, and upon taking admittance to copyholds, might be so raised (*m*). Where there is a power to raise fines out of *annual* rents and profits, with power to mortgage in case the necessary sums shall not be provided in that manner, the fines will be payable out of the income, if it be sufficient (*n*). But where the power is simply to raise the fines out of the rents, or by mortgage, then if the trustees refuse to exercise their discretion as to the mode of raising the money, the court, in pursuance of its general principles, will so raise it as to throw the burthen upon the parties in proportion to their interests in the property charged; although it seems the trustees, in the exercise of their power, might have made a different disposition (*o*). So the arrears of a rent-charge or annuity charged on land, may, in the discretion of the court, be directed to be raised by sale or mortgage of the fee, were the estate and the burden of the charge are both in the same hands, notwithstanding the existence of a legal right to recover by entry or distress (*p*).

Paragraphs
366—368

Where gross sum raisable out of rents it may be raised by mortgage.

367. Trustees were authorized by statute between 1860 and 1883 (*q*), in case any money should be required for equality of exchange, or for the renewal of any lease authorized by the Act, to raise it by mortgage. But this provision has been repealed (saving existing rights) by the Settled Land Act, 1882, s. 64; by which power to raise money for enfranchisement, or equality of exchange, or partition, by mortgage in fee or for a term or otherwise, is vested in tenants for life of settled estates (*r*). (**321**).

Formerly trustees, but now tenant for life, might mortgage to raise money for renewals of leases or equality of exchange.

368. A power for trustees to mortgage is also sometimes implied in a power to sell (*s*), viz., where to satisfy the terms, or the proposed

Power to mortgage sometimes

(*l*) *Per* Lord ELDON in *Bootle v. Blundell*, 1 Mer. at p. 233; and *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. Jun. 227; *Green v. Belchier*, 1 Atk. 505.

(*m*) *Allan v. Backhouse*, 2 Ves. & B. 65, affirmed Jac. 631; *Playters v. Abbott*, 2 Myl. & K. 97; see *Garmstone v. Gaunt*, 9 Jur. 78

(*n*) *Solley v. Wood*, 29 Beav. 482.

(*o*) *Jones v. Jones*, 5 Hare, 440; *Ainslie v. Harcourt*, 28 Beav. 313; see also *Redman v. Rymer*, 65 L. T. 270, (C. A.)

(*p*) *Cupit v. Jackson*, 13 Pr. 721; *Philipps v. Philipps*, 8 Beav. 193; *White v. James*, 26 Beav. 191; *Horton v. Hall*, L. R. 17 Eq. 437; *Taylor v. Taylor*, L. R. 17 Eq. 324; *Hall v. Hurt*, 2 Johns. & H. 76; *Scottish Widows' Fund v. Craig*, 20 Ch. D. 208; *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323. But not where there is a term limited for securing it. *Blackburne v. Hope-Edwardes*, [1901] 1 Ch. 419.

(*q*) 23 & 24 Vict. c. 145, s. 9.

(*r*) Settled Land Act, 1882, s. 18.

(*s*) *Mills v. Banks*, 3 P. Wms. 1; *Haldenby v. Spofforth*, 1 Beav. 390; *Sroughill v. Anstey*, 1 De G. M. & G. 635; *Page v. Cooper*, 16 Beav. 396; *Earl of Orford v. Earl of Albemarle*, 17 L. J. Ch. 396; but see *Re Jones, Dutton v. Brookfield*, 59 L. J. Ch. 31; where such a power was implied from words empowering a trustee to settle accounts and wind up the testator's affairs as he should think best, and in so doing to make any sales or arrangements he might judge expedient.

Paragraphs
368—370
 implied from
 power to sell
 or from
 power of
 management.

object of the power—as, for instance, to raise a particular charge, subject to which the estate is devised—it is not necessary to make an absolute conversion. But a mortgage cannot be made under an absolute *trust* for sale, with power to buy in and resell, as may appear most beneficial (*t*). And if the raising of a charge by sale be forbidden, the prohibition extends also to the raising it by mortgage, which may cause the loss of the estate by sale or foreclosure (*u*). A power to mortgage may also be implied from powers of management which necessitate the expenditure of capital (*x*).

Court will
 not interfere
 with trustees'
 discretion.

Costs.

369. When trustees are empowered to raise money for particular purposes at their absolute discretion, the court will not interfere with their discretion as to the occasion, or the manner of exercising the power, or the refusal to exercise it in any particular manner, though they are bound to effect the general purpose (*y*). Trustees empowered to raise money by mortgage have an implied power to raise the incidental costs by mortgage of the same property (*z*).

Formerly
 doubtful
 whether
 fiduciary
 mortgagor
 could give
 power of
 sale.

370. Where the person who creates the security, creates it under a trust or power, the question may arise whether, without special authority, he can insert in it a power of sale. It appears now to be settled that a personal representative mortgaging the leasehold of his testator or intestate (*a*), or a trustee with power to raise money by sale or mortgage of real or leasehold property, or by mortgage of chattel property, (which from its nature can be dealt with only by bill of sale, or some kindred form of security), may add to the mortgage a power of sale (*b*), though it is not a breach of trust to omit to do so (*c*). It was formerly doubtful whether a mere power to trustees to mortgage *real* estate, enabled them to give the mortgagee a power of sale (*d*), and the doubt, perhaps, still remains in regard to mortgages executed before 1882. The court, however, has frequently given authority to insert the power in a mortgage of infants' real estate, for the payment of debt and costs (*e*), and

(*t*) *Devaynes v. Robinson*, 24 Beav. 86.

(*u*) *Bennett v. Wyndham*, 23 Beav. 521.

(*x*) See *Re Bellinger*, *Durell v. Bellinger*, [1898] 2 Ch. 534.

(*y*) *Tempest v. Lord Camoys*, 21 Ch. D. 571, distinguished in *Re Courtier*, *Coles v. Courtier*, 34 Ch. D. 136.

(*z*) *Armstrong v. Armstrong*, L. R. 18 Eq. 541.

(*a*) *Sanders v. Richards*, 2 Coll. C. C. 568; *Cruikshank v. Duffin*, L. R. 13 Eq. 555.

(*b*) *Russell v. Plaice*, 18 Beav. 21; *Bridges v. Longman*, 24 Beav. 27; *Clarke v. Panopticon*, (*The Royal*), 3 Jur. (N.S.) 178.

(*c*) *Farrar v. Barraclough*, 2 Sm. & G. 231.

(*d*) Cf. *Clarke v. Panopticon*, (*The Royal*), *supra*; *Drake v. Whitmore*, 5 De G. & Sm. 619; with *Bridges v. Longman*, *supra*; (but there the settlement contained a power to sell). *Cook v. Dawson*, 29 Beav. 123. In the case of an executor, the objection arising from the delegation of a power does not apply. See *Earl Vane v. Rigden*, L. R. 5 Ch. 663.

(*e*) *Selby v. Cooling*, 23 Beav. 418; *Drake v. Avery*, cited there.

it is considered to be very unlikely that in these days any objection to such a power contained in the mortgage executed before 1882 would be sustained. Anyhow, with regard to mortgages executed since the 31st December, 1881, there can be no doubt that by the combined operation of ss. 19 and 66 of the Conveyancing and Law of Property Act, 1881, the statutory powers of sale, etc., need not be negatived in a mortgage made by a trustee.

Paragraphs
370—372

371. Where a conveyance, dated before 1882, although absolute in form, was ordered to stand only as a security for the sum found due, a power of sale was not considered to be imported into it (*f*). But it seems questionable whether this would be so in deeds executed since the Conveyancing and Law of Property Act, 1881, came into force.

Conveyance absolute in form, but really only a mortgage, does not import power of sale.

372. The power which was always vested in an executor or administrator, by virtue of his office, to raise money by sale of the leasehold and other personalty of the testator, for payment of debts, special and testamentary expenses, was by the 1st and 2nd sections of the Land Transfer Act, 1897, extended to freeholds, and to copyholds, in which the deceased merely had an equitable interest (*g*). of persons dying after the 31st December, 1897. And the power enables an executor to raise money by mortgage or pledge even of property specifically devised or bequeathed. The power of the executor in this respect corresponds with the power which formerly belonged to a trustee, where there was a charge of debts and legacies upon real estate (*h*) (**362**). And (as in that case) if there is a presumption that the money is *not* required to pay debts, or for some other necessary purpose, the lender is bound to ascertain that it is properly raised (*i*). But, *prima facie*, the presumption is that the money *is* required (**374**). The power is not affected by a mere administration decree, if no receiver have been appointed nor any injunction granted to restrain him from dealing with the assets, notwithstanding the doctrine of *lis pendens* (*k*) (**1116**). Where an executor is also residuary legatee, and creates an equitable mortgage of leaseholds “as absolute owner,” the fact that he is executor will not give his mortgagee priority over legatees having prior equities (*l*). In the case of real estate, however, one of several personal representatives is expressly prohibited by the Act of 1897 from mortgaging without the leave of the executor, here differing

Executor might always mortgage personalty, and may now mortgage realty.

(*f*) *Pearson v. Benson*, 28 Beav. 598.

(*g*) See *Re Harrouby & Paine's Contract*, [1902] W. N. 137, and *Re Somerville & Turner's Contract*, [1903] 2 Ch. at p. 588.

(*h*) *M'Leod v. Drummond*, 17 Ves. 152; *Watkins v. Cheek*, 2 Sim. & St. 199; *Russell v. Plaice*, 18 Beav. 21; *Doe d. Woodhead v. Fallows*, 2 Cr. & J. 481; *Re Whistler*, 35 Ch. D. 561; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101.

(*i*) *Ricketts v. Lewis*, 20 Ch. D. 745.

(*k*) *Berry v. Gibbons*, L. R. 8 Ch. 747.

(*l*) *Re Queale*, 17 L. R. Ir. 361; *Cf. Re Roulston's Trust*, 21 L. R. Ir. 503.

Paragraphs
372—374

from his powers of mortgaging the personal estate. Where an executor has neither proved nor disclaimed he is nevertheless one of the personal representatives for the purpose of this proviso (*m*).

Charge of
debts
confined to
testator's
debts at
death.

373. A charge of debts upon real estate, contained in a will which also directs the executors to carry on the testator's business, does not authorize them to mortgage the real estate, which was not employed at his death in the business, for the payment of debts incurred in carrying it on under the will (*n*). But possibly they can do so with regard to real estate employed in the business at the testator's death (*o*).

Mortgagee
not bound to
enquire as to
necessity of
mortgage,
unless he has
notice of
impropriety.

374. Although the taking a mortgage from an executor with knowledge that he fills that character, necessarily implies notice of a will, the mortgagee has a right to infer that the executor is acting fairly in the execution of his duty, and is not bound to inquire as to debts and legacies, or whether the executor is justified in pledging the assets; and he is not affected with notice of an improper application of the mortgage money, provided there be no connivance between the mortgagee and the executor to the injury of the estate or of the devisees, and that the transaction be not obviously one in which the executor is acting in breach of his duty, or which amounts to a *devastavit*. A person so dealing with an executor does not (*p*) generally become affected by a breach of trust, by taking a mortgage of the assets, whether specifically bequeathed or otherwise; because *prima facie* the dealing is consistent with the duty of an executor. But (not to speak of cases of palpable fraud, such as discounting the executor's private debt out of consideration money, with notice that a debt of the testator remained unpaid (*q*)) the advance of money to the executor for his private purposes, or in his character of a trader, or in any other manner contrary to the duty or objects of his office, will generally affect the person by whom the money is lent (*r*). And if it appear that the security was made for a debt already due from the executor, and not for a present advance (*s*), the case will be stronger against the mortgagee, because the transaction is *prima facie* inconsistent with the duty of an executor. If the executor, upon borrowing the money, represent that "part of it" is required

(*m*) *Re Pawley and London & Provincial Bank*, [1900] 1 Ch. 58.

(*n*) *M'Neillie v. Acton*, 17 Jur. 1041.

(*o*) *Devitt v. Kearney*, 13 L. R. Ir. 45.

(*p*) *Mead v. Lord Orrery*, 3 Atk. 235; *M'Leod v. Drummond*, 17 Ves. 152; *Bonney v. Ridgard*, 1 Cox, 145; *Elliott v. Merriman*, 2 Atk. 41; *Scott v. Tyler*, 2 Dick, 712; *Keane v. Robarts*, 4 Madd. 332; *Taylor v. Hawkins*, 8 Ves. 209; see *Downes v. Power*, 2 Ba & Be. 491; *Sharshaw v. Gibbs*, Kay, 333—336; *Re Whistler*, *supra*; *Re Venn & Furze's Contract*, *supra*; *Re O'Donnell's Estate*, [1905] 1 Ir. Reps. 406; *Re Henson*, *Chester v. Henson*, [1908] 2 Ch. 356.

(*q*) *Crane v. Drake*, 2 Vern. 616.

(*r*) *Scott v. Tyler*, 2 Dick. 712; *M'Leod v. Drummond*, 17 Ves. 152.

(*s*) *M'Leod v. Drummond*, 14 Ves. 353; *Keane v. Robarts*, 4 Madd. 332; *Watkins v. Cheek*, 2 Sim. & St. 199.

for executorship purposes, the *onus* of showing how much was required for those purposes is on the borrower; and the court will direct an inquiry as to the amount so applied (*t*). Paragraphs
374—377

375. Yet the pledge for the private debt of an executor may be supported, if the executor be himself beneficially interested in the whole or part of the property, and effect the security in terms which indicate an intention to charge his beneficial interest, and not to mortgage in the representative character (*u*). So if the executor be a specific legatee, and there are no debts outstanding, he may mortgage the legacy to secure his private debt; and an inquiry as to the payment of the testator's debts will not be granted as of course, or unless some ground for it be apparent on the pleadings (*x*). If the mortgagee does not deal with the executor under the legal authority incident to that character, but upon the faith of his representation that he is entitled to the property offered as security, or that he has special authority to mortgage, he becomes bound (*y*) to inquire into the truth of the representation, and cannot avail himself of the protection given to persons who deal with executors in their representative character. Mortgage by
executor for
his private
debt.

376. A purchaser from an executor need not have any recital of the purpose for which the money is raised (*z*); and is equally protected whether he have an actual assignment or a deposit only (*a*). And the court will not give relief (*b*), after a long acquiescence in the transaction by persons having a sufficient interest to impeach it, on the ground that the circumstances made it proper that the purchaser should have inquired into the necessity for raising the money. Purchaser
from executor
protected
by court.

377. Where the *executors* of a partner sell to the surviving partners, under a direction in the will, leaving part of the purchase-money on security, the purchasers are protected by the character under which the executors sell, and may plead that they are purchasers for valuable consideration, without notice of the trusts of the will (*c*). But the protection does not extend to the surviving Distinction
between sale
by executors
and by
trustees.

(*t*) *Carter v. Sanders*, 2 Drew. 248.

(*u*) *Haynes v. Forshaw*, 11 Hare, 93; see *Farhall v. Farhall*, L. R. 7 Ch. 123, and *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Lord Orrery*, 3 Atk. 235. But see *Bonney v. Ridgard*, 1 Cox, 145; *M'Leod v. Drummond*, 17 Ves. at p. 164. If the executor be indebted to the estate, the mortgage will be postponed to the claim of the estate, and is compellable to deliver the deeds to the co-executors. (*Cole v. Muddle*, 10 Hare, 186.)

(*x*) *Taylor v. Hawkins*, 8 Ves. 209.

(*y*) *Hill v. Simpson*, 7 Ves. 152; see *Jones v. Stöhwasser*, 16 Ch. D. 577.

(*z*) *Bonney v. Ridgard*, 1 Cox, 145.

(*a*) *Scott v. Tyler*, 2 Dick. 712; *Carter v. Sanders*, 2 Drew. 248. See observations of MELLISH, L.J., *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567.

(*b*) *Andrew v. Wrigley*, 4 Bro. C. C. 125.

(*c*) *Chambers v. Howell*, 11 Beav. 6; but see *Hardingham v. Nicholls*, 3 Atk. 304, as to leaving part of the purchase-money on security.

Paragraphs
377—379

partners in a trade concern, in which the testator's *trustees*, by his direction, leave part of his assets. In such a case the surviving partners dealing with the testator's property, with knowledge that it forms part of his estate, must inquire into the trusts, and are fixed with notice of them accordingly (*d*).

Mortgages by
trustees in
bankruptcy.

378. The trustee of a bankrupt may, with the permission of the committee of inspection, mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts (*e*).

Charity Com-
missioners
may authorize
mortgages of
charity
estates.

379. By the Charitable Trusts Acts (*f*), the Board of Charity Commissioners may authorize trustees of charity estates to raise money by mortgage of the estates for certain repairs and improvements, or any other purpose which the board shall consider beneficial to the charity and not inconsistent with the trusts, with provisions for directing the administrators of the charity to discharge the principal debt or part thereof, by yearly or other instalments, within thirty years from the date of the security; or to form a sinking fund out of the income for discharging the principal debt, or any portion thereof, within the same period: and shall give directions as to the investment and accumulation of such fund. Without such leave no mortgage can be made, even although the foundation deed contains an express power in that behalf (*g*).

SECTION X.

Of Securities by Agents.

SUB-SECTION (1).—*Securities by Agents generally.*

PARAGRAPH

<i>Agents generally cannot pledge or mortgage without express authority</i>	..	380
<i>But principal bound where he has enabled agent to fraudulently mortgage</i>	..	381
<i>Implied powers in certain cases</i>	.. .. .	382

SUB-SECTION (2).—*Securities by Mercantile Agents under the Factors Act, 1889.*

<i>Apart from Factors Acts powers of mercantile agents to bind principal very limited</i>	.. .. .	383
<i>Who are mercantile agents for purposes of Act</i>	.. .. .	384
<i>Definition of goods, possession, documents, pledge and person</i>	.. .. .	385
<i>Powers of mercantile agents with regard to disposition of goods</i>	.. .. .	386
<i>Act only protects bonâ fide pledges without notice</i>	.. .. .	387

(*d*) *Travis v. Milne*, 9 Hare, 141.

(*e*) Bankruptcy Act, 1883, s. 57 (5); 35 & 36 Vict. c. 58, s. 101 (1) (Bankruptcy (Ireland) Amendment Act, 1872).

(*f*) 16 & 17 Vict. c. 137, s. 21; 18 & 19 Vict. c. 124, s. 30; and 23 & 24 Vict. c. 136, s. 15.

(*g*) *Re Mason's Orphanage and London & North Western Rail. Co.* (1896), 1 Ch. 596.

SUB-SECTION (2).—*Securities by Mercantile Agents under the Factors Act 1889 (continued)*—

Paragraphs
380—381

PARAGRAPH

<i>Notice that mandate was to sell, not necessarily notice that factor forbidden to pledge</i>	388
<i>Act enables factor to pledge equity of redemption</i>	389
<i>Effect of pledges of documents of title</i>	390
<i>Pledge for antecedent debt</i>	391
<i>Rights acquired by exchange of goods or documents</i>	392
<i>Agreements through clerks, etc.</i>	393
<i>Provisions as to consignors and consignees</i>	394
<i>Mode of transferring documents of title</i>	395
<i>Saving for rights of true owner against factor and also to redeem</i>	396
<i>Powers of Act to be in addition to extraneous powers</i>	397

SUB-SECTION (3).—*Securities by Bankers and Brokers.*

<i>General power of banker to pledge customer's negotiable instruments</i> ..	398
<i>General power of bill broker to pledge customer's bills</i>	399
<i>General power of stock broker to pledge customer's negotiable securities</i> ..	400

SUB-SECTION (4).—*Securities by Partners.*

<i>General power to pledge personal property</i>	401
<i>Whether pledge for separate debt covers advances to firm</i>	402
<i>Partner cannot give legal, but probably can give equitable mortgage of real estate</i>	403
<i>Part owner of ship cannot pledge the freight</i>	404

SUB-SECTION (1).—*Securities by Agents Generally.*

380. An implied power to mortgage or pledge is sometimes vested in persons as agents, over property of which they have only a temporary control without any right of property. As a general rule, the control which an agent has over his principal's property does not authorize him to pledge it. It is, therefore, laid down (*h*) that a solicitor cannot without authority (express or to be implied from strong circumstances), either pledge his client's deeds or do anything to prejudice his estate or interest under them.

381. But where a principal hands his title deeds to an agent to raise a specific sum, and that agent uses them for the purpose of raising a much larger sum (forging his principal's signature to a memorandum of deposit), the principal will not be able to redeem without paying the entire sum for which they were pledged (*i*). For as the agent had authority to pledge for a specific sum, the pledge is at all events good *pro tanto* and not void altogether, and as the equities are equal the court will give no relief against the *bonâ fide* pledgee.

(*h*) Per TURNER, L.J., in *Cory v. Eyre*, 1 De G. J. & S. at p. 168.

(*i*) *Brocklesby v. Temperance Permanent Building Society*, [1895] A. C. 173.

Paragraphs
382—383

Implied
 powers in
 certain cases.

382. Exceptions to the general rule have arisen from necessity, and by the custom of trade, and have in some cases been authorized and regulated by statutes, as in the case of the Factors Acts (now consolidated by the Factors Act, 1889). So a debtor carrying on business according to resolutions passed by his creditors, under which he is to pay a composition, has an implied power to raise money on the assets for the purposes of the business or for payment of the composition (*k*). And a notable exception, founded upon necessity only, is the power to hypothecate the ship, which is vested in the master; this has already been considered under the head of bottomry, which is the only form in which the power can be exercised (**235**)—the master being unable, without special authority, to mortgage or pledge the freight of the ship or cargo in any other way, or to direct payment of the freight to any other person than the shipowner (*l*). Some other exceptions to the general rule will now be examined.

SUB-SECTION (2).—*Securities by Mercantile Agents under the Factors Act, 1889.*

Apart from
 Factors Acts,
 a factor or
 other agent
 had very
 limited
 power to bind
 principal.

383. Before the passing of certain Acts of Parliament known as the Factors Acts, the law was that although a consignee, factor or other agent, intrusted with the possession of goods for the purpose of sale, might, to the extent and with notice of his own lien, give security by delivering them to another to hold for him in his name and as a continuance of his own possession (*m*); yet a tortious pledge by the factor was of no avail against the true owner of the goods; upon the principle that he who gives credit to another must be vigilant in ascertaining his debtor's right to pledge (*n*). The owner, therefore, upon tender of what was due to the factor, could recover the proceeds of the sale of the goods from the pawnee, without regard (*o*) to the advances made by the latter to the factor; and the delivery of the goods or bill of lading by the broker for the purpose of sale, to a third person, who made advances in anticipation of the sale, was treated as a pledging of the goods; though the possession so given, being in accordance with the object of the original consignor, was legal (*p*). Nor was an authority to pledge considered to be implied (*q*) by a direction to the factor to deal with the goods at his discretion; or by reason that the principal drew against the factor,

(*k*) *Exp. Allard, re Simons*, 16 Ch. D. 505.

(*l*) *The Sir Henry Webb*, 13 Jur. 639; *Reynolds v. Jex*, 7 B. & S. 86.

(*m*) *M'Combie v. Davies*, 7 East, 5.

(*n*) *Paterson v. Tash*, 2 Str. 1178; *Queiroz v. Trueman*, 3 B. & C. 342.

(*o*) *Daubigny v. Duval*, 5 T. R. 604.

(*p*) *Newsom v. Thornton*, 6 East, 17; *Kuckein v. Wilson*, 4 B. & Ald. 443.
Martini v. Coles, 1 Mau. & S. 140.

(*q*) *Graham v. Dyster*, 6 Mau. & S. 1; *Queiroz v. Trueman*, *supra*.

or requested him to make remittances in anticipation of the sales ; nor was it given by a direct authority to sell, assign and transfer (*r*). Paragraphs
383—386

384. The Factors Acts, which greatly altered the law in this respect, have been consolidated by the Factors Act, 1889 (*s*), and as that Act has now been in operation for twenty years it appears to be unnecessary to comment on the legislation prior to it. The first part of the Act refers exclusively to mercantile agents ; and a mercantile agent is defined to be “ a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.” It has been held that, under this definition, a mere forwarding agent is not a mercantile agent within the statute (*t*) ; but a retail jeweller who accepts goods from a manufacturing firm on “ sale or return ” is (*u*). Who are
mercantile
agents for
purposes of
Factors Act.

385. The first section of the Act also contains the following definitions :—“ A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody, or are held by any other person subject to his control or for him or on his behalf ; ” Definitions of
“ goods,”
“ possession,”
“ documents
of title,”
“ pledge,” and
“ person.”

“ The expression ‘ goods ’ shall include wares and merchandise.” But the expression does not include certificates or other documents of title to choses in action ; *ex. gr.*, railway stock (*x*).

“ The expression ‘ document of title ’ shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented ; ”

“ The expression ‘ pledge ’ shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance, or of any further or continuing advance or of any pecuniary liability ; ”

“ The expression ‘ person ’ shall include any body of persons corporate or incorporate.”

386. By the 2nd section it is enacted as follows :—“ (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or Powers of
mercantile
agent with
respect to

(*r*) *De Bouchout v. Goldsmid*, 5 Ves. 211.

(*s*) 52 & 53 Vict. c. 45.

(*t*) *Martinez y Gomez v. Allison*, 17 Ct. of Sess. Cas. 332.

(*u*) *Weiner v. Harris*, [1910] 1 K. B. 285, overruling *Hastings, Ltd. v. Pearson*, [1893] 1 Q. B. 62. See also and consider *Tremouille v. Christie*, 69 L. T. 338, following *Heyman v. Flewker*, 13 C. B. (N.S.) 519 ; and see also *Wood v. Rowcliffe*, 6 Hare, 183 ; *Lamb v. Attenborough*, 8 Jur. (N.S.) 280 ; and *City Bank v. Barrow*, 5 App. Cas. 664.

(*x*) *Freeman v. Appleyard*, 32 L. J. Ex. 175.

Paragraphs
386—387

disposition
of goods.

other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, is, subject to the provisions of the Act, to be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

“(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not, at the time thereof, notice that the consent has been determined (y).

“(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

“(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.”

Act only
protects
bonâ fide
pledges
without
notice.

387. The Act only protects loans, advances and exchanges made *bonâ fide* by the person who contracts with the agent and without notice that the agent has no authority to contract, or is acting *malâ fide* against the owner. If there be no such notice, the principal, who has intrusted the agent with documents or goods, which enabled him to deal with them fraudulently, will be bound (z). And, on the authority of cases decided under the repealed Acts, it would seem that the circumstances, a knowledge of which will constitute notice of want of authority or *malâ fides*, must be such that the fact would be inferred by a reasonable man of business, who has applied his understanding to the matter (a). But mere suspicion will not affect the transaction; nor the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them. The expression in section 2 (1) “when acting in the ordinary course of business of a mercantile agent” means “acting in such a way as a mercantile agent, acting in the ordinary course of business of a mercantile agent, would act,” i.e. within business hours at a proper place of business, and in other respects in the ordinary

(y) This was not so prior to August 16th, 1877; cf. *Fuentes v. Montis*, L. R. 3 C. P. 268; L. R. 4 C. P. 93; and 40 & 41 Vict. c. 39, s. 2.

(z) *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113; *Babcock v. Lawson*, 4 Q. B. D. 394; 5 Q. B. D. 284.

(a) *Navulshaw v. Brownrigg*, 1 Sim. (N.S.) 573; *Gobind Chunder Sein v. Ryan*, 9 Moo., Ind. App. 140; 8 Jur. (N.S.) 343.

way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make (*b*). The question of *malâ fides* is for the jury, and the facts of want of good faith, or want of authority and of notice, should be found by them categorically (*c*).

Paragraphs
387—392

388. Notice that the factor holds the goods for sale, is not notice of *mala fides* in the pledge under the statute, unless there was notice that he was prohibited from pledging; nor is it material that the agent intrusted with the goods was so intrusted by fraudulent representations (*d*). But if the consignee obtain a loan to enable him to pay a debt to which he and the lender were jointly liable, and pledge the goods to the latter as security; this being no real loan, but only a contrivance to pay the debt, was not protected by the repealed statute, 5 & 6 Vict. c. 39 (*e*), and would not, it is submitted, be protected by the Act of 1889.

Notice that factor's mandate was to sell, not necessarily notice that he could not pledge.

389. If a factor pledge goods for less than their value, they are considered to be held for him by the pledgee, to the extent of the unexhausted value, so as to enable him to re-pledge them or the balance of the proceeds arising from their sale (*f*).

Act enables factor to pledge equity of redemption.

390. By the third section of the Act, a pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Effect of pledges of documents of title.

391. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee is to acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*g*).

Pledge for antecedent debt.

392. The consideration necessary for the validity of a sale, pledge, or other disposition of goods in pursuance of the Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration. But where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods

Rights acquired by exchange of goods or documents.

(*b*) *Oppenheimer v. Attenborough & Son*, [1908] 1 K. B. 221.

(*c*) *Id.*; *Douglas v. Ewing*, 6 Ir. C. L. R. 395.

(*d*) *Navulshaw v. Brownrigg*, 1 Sim. (N.S.) 573; *Sheppard v. Union Bank of London*, 8 Jur. (N.S.) 265. But, of course, if he obtained them by theft it would be otherwise, for then he would not have been "intrusted" with them.

(*e*) *Learoyd v. Robinson*, 12 Mee. & W. 745.

(*f*) *Portalis v. Tetley*, L. R. 5 Eq. 140.

(*g*) Section 4, and see *Martinez y Gomez v. Allison*, 17 Court of Sess. Cas. 332; *Macnee v. Gorst*, L. R. 4 Eq. 315; *Jewan v. Whitworth*, L. R. 2 Eq. 692; *Exp. Roy, re Sillence*, 7 Ch. D. 70. And see also *Kaltenbach v. Lewis*, 10 App. Cas. 617.

Paragraphs
392—397

so pledged, in excess of the value of the goods, documents, or security when so delivered or transferred in exchange (*h*).

Agreements
through
clerks, etc.

393. For the purposes of the Act, an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf, is to be deemed to be an agreement with the agent (*i*).

Provisions as
to consignors
and con-
signees.

394. Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee is, in respect of advances made to or for the use of such person, to have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person; but this provision is not to limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent (*k*).

Mode of
transferring
documents.

395. For the purposes of the Act, the transfer of a document may be by endorsement; or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery (*l*).

Saving for
rights of
true owner.

396. Nothing in the Act (1) is to authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing; or

(2) Prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof; or prevent the owner of goods pledged by an agent, from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien; or

Prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent (*m*).

Saving for
common law
powers of
agent.

397. The provisions of the Act are to be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act (*n*).

(*h*) Section 5.

(*i*) Section 6.

(*k*) Section 7. See *Mildred v. Maspons*, 8 App. Cas. 874.

(*l*) Section 11.

(*m*) Section 12. See *Kaltenbach v. Lewis*, 10 App. Cas. 617.

(*n*) Section 13.

SUB-SECTION (3).—*Securities by Bankers and Brokers.*Paragraphs
398—400

398. Bankers, to whom negotiable securities are intrusted by their customers for the purpose of receiving the proceeds, can make a good pledge (as against the customer) to a person taking honestly (*o*). The security will, of course, be invalid if the pledgee have notice of the want of authority, and such notice is sufficiently conveyed by a special indorsement on the bill for the account of the principal (*p*), nor can the banker give a good title, as against the owner, to securities which are not negotiable (*q*).

General power to pledge customers' negotiable instruments.

399. A *bonâ fide* advance to a bill broker, on the deposit of bills, will also confer a good title, where the pledgee has no notice that they were held merely for the purpose of discount. But no such right will be conferred where the bills are deposited to secure money already due from the broker. The bill broker, in the absence of evidence as to the nature of his employment, is considered as an agent for procuring a loan of money on each bill separately; and according to the general law he has no right to risk the detention of the bill of one customer for losses arising from the dishonoured bills of another, by mixing the bills and pledging the mass for an entire sum. But where a custom so to mix and pledge the bills is proved to exist (as it does in London), it is upheld; and the pledgee is considered to be safe if he have honestly taken the bills for value in the course of business, though without any special precaution (*r*).

General power of bill broker to pledge customers' bills.

400. Stock brokers, to whom a customer has intrusted documents of title to stocks or shares, for the purpose of selling or completing the sale of such stocks or shares, or for the purpose of causing such stocks or shares to be registered in the customer's name, can pledge such documents so as to confer a good title on the pledgee in only two ways. If the documents be negotiable instruments, a person taking them for value without notice of any infirmity in the title, would have a right to hold them even against a prior owner who had never intended to part with the property in them (*s*). Or, again, such an owner may have so acted as to be estopped from setting up a claim as against a person who has *bonâ fide* and for value taken the instruments by way of pledge (*s*). Therefore, where a broker in fraud of his customer pledged

General power of stockbroker to pledge customer's negotiable securities.

(*o*) *Collins v. Martin*, 1 Bos. & P. 648; *Exp. Pease*, 19 Ves. 25. The bond of a foreign prince, payable to the holder for the time being, and proved to be negotiable like an exchequer bill, falls within the rule as to negotiable securities. (*Gorgier v. Mieville*, 3 B. & C. 45.)

(*p*) *Treuttel v. Barandon*, 8 Taunt. 100.

(*q*) *Glyn v. Baker*, 13 East, 509.

(*r*) *Haynes v. Foster*, 2 Cr. & M. 237; *Foster v. Pearson*, 1 C. M. & R. 849.

(*s*) *Per Lord HERSCHELL, Colonial Bank v. Cady*, 15 App. Cas. 267, 283; *London Joint Stock Bank v. Simmons*, [1892] A. C. 201; *Baker v. Nottingham, etc., Banking Co.*, 60 L. J. Q. B. 542.

Paragraphs
400—401

negotiable securities with a bank for an advance, and the bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had authority to deal with them, and made no inquiries, it was held that there being as a matter of fact no circumstances to create suspicion, the bank was entitled to retain and realize the negotiable securities, having taken them for value and in good faith (t). The decision of the House of Lords, in a contrary sense, in the case of the *Earl of Sheffield v. The London Joint Stock Bank* (x), turned entirely on the special facts of that case, which were held to impute to the bank notice of the irregularity of the pledge (t). In short, the mere fact that a pledgor of negotiable securities is a stock broker, is not sufficient to put the pledgee on inquiry as to whether the instruments are his or his clients'.

As an instance of a customer being estopped by his own conduct from repudiating the pledge made by his broker, may be cited the case of *Bentinck v. The London Joint Stock Bank* (t), where the client, who was indebted to the broker, had, at the broker's request, executed transfers of stocks to persons who were in fact nominees of the bank (y).

SUB-SECTION (4).—*Securities by Partners* (z).

Under
Partnership
Act, partner
may bind
firm except
where he has
neither
apparent
nor real
authority.

401. By the 5th section of the Partnership Act, 1890 (a), it is enacted that "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of any partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

General
power to
pledge
personal
property.

Any one of several partners, (z) or persons associated as partners in a particular transaction, may pledge or make a security affecting the personal property of the partners, for a loan or debt contracted for the ordinary purposes of the undertaking, where there is no notice of fraud or want of authority (b). And this power continues

(t) *London Joint Stock Bank v. Simmons*, *supra*, and see also *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120.

(x) 13 App. Cas. 333.

(y) And see also *Goodwin v. Roberts*, 1 App. Cas. 476.

(z) This sub-section of the present work treats only of partners in the full meaning of the word, and has no reference to the "limited partners" constituted under the Limited Partnerships Act, 1907 (7 Ed. 7, c. 24), who, under the provisions of sec. 6 (1) of that Act, "shall not take part in the management of the partnership business, and shall not have power to bind the firm."

(a) 53 & 54 Vict. c. 39.

(b) *Raba v. Ryland*, Gow, 132; *Tupper v. Haythorne*, cited Gow 135, n.; *Exp. Bonbonus*, 8 Ves. 540; *Reid v. Hollinshead*, 4 B. & C. 867; *Ridley v. Taylor*, 13 East, 175; *Exp. Bosanquet*, De G. 432; *Exp. Howden*, 2 Mont. D. & De G. 574.

after the dissolution of the partnership, for the purposes of winding up the affairs, and of contracts entered into during its continuance (c). But the partnership will not be bound by a security given by one of the firm to a person who knowingly makes advances for extraordinary purposes: such as raising additional capital for payment of the shares of a deceased partner, or making new arrangements for carrying on the business (d). Nor, *à fortiori*, can one member of the firm bind the others by a security for the payment of his separate debt, unless the creditor can prove a direct assent by the other partners, or circumstances from which such assent may reasonably be inferred. The presumption is, that such a security was known by the creditor to have been given without the authority of the firm, and he takes the onus of proving the authority (e); and if such a security be made by a partner knowing that his firm is insolvent, it is a fraud upon the creditors of the firm and an act of bankruptcy (f).

Paragraphs
401—402

402. If one of several partners give separate security for advances to himself, the security will cover advances on account of the firm, if it can be shown that the original pledge was made to secure a partnership debt (g). But where the security clearly relates to a separate debt, the mere existence of partnership dealings in connection with the money raised, without evidence to connect the security with such dealings, will not entitle the creditor to retain the security for money due from the partnership; and it makes no difference that the property which formed the separate security has afterwards become vested in the firm (h).

Whether
pledge for
separate
debt covers
advances to
the firm.

Upon the death of a partner, whose separate property is liable for a partnership debt, the dissolution of the partnership prevents the continuance of the security for further advances; and if the dealings continue with the surviving partners, any subsequent

(c) *Butchart v. Dresser*, 4 De G. M. & G. 542; and see *Re Bourne, Bourne v. Bourne*, [1906] 2 Ch. 427.

(d) *Fisher v. Tayler*, 2 Hare, 218.

(e) *Snaith v. Burridge*, 4 Taunt. 684; *Exp. Thorpe, re Wardley*, 2 Deac. 16; *Frankland v. McGusty*, 1 Knapp P. C. 274; *Levieson v. Lane*, 9 Jur. (N.S.) 670; notwithstanding the dictum of Lord ELLENBOROUGH in *Ridley v. Taylor, supra*. But the partner who has improperly made the pledge cannot take advantage of his want of power and repudiate his own act. (*Brownrigg v. Rae*, 5 Ex. 489; see *Gordon v. Ellis*, 7 Man. & Gr. 607; *Hawker v. Hallewell*, 3 Sm. & G. 194.) As to form of order where a partner has mortgaged his share to secure his separate debt, see *Whetham v. Davey*, 30 Ch. D. 574.

(f) *Exp. Snowball, re Douglas*, L. R. 7 Ch. at p. 542.

(g) *Chuck v. Freen*, 1 Moo. & M. 259, notwithstanding *Exp. Freen*, 2 Gl. & J. 246, where the Vice-Chancellor refused to admit evidence of the parol arrangements.

(h) *Exp. M'Kenna, The City Bank Case*, 3 De G. F. & J. 629; 7 Jur. (N.S.) 588.

Paragraphs 402—405 payments to the creditor will go in discharge of the part of the original debt which was due from the deceased partner (*i*).

Partner cannot give a legal but can probably give equitable mortgage on real estate of firm.

403. A partner cannot give a legal mortgage on the real estate of the firm, where the parties are joint tenants or tenants in common inasmuch as he cannot execute a deed binding his co-partners without express authority under seal (*k*). There appears to be no express authority as to the right of a partner to create an equitable security on the real estate of the firm so as to bind his living partners. Lord Justice *Lindley*, however, considers that probably a partner having power to borrow may give a valid equitable security by deposit of deeds or otherwise, over any real estate of the firm (*l*). And in the recent case of *Re Bourne*, *Bourne v. Bourne* (*m*), it was held by the Court of Appeal that a *surviving* partner has power to mortgage the partnership property whether real or personal to secure a partnership debt, and that such mortgage takes priority of the deceased partner's partnership lien.

Part-owner of ship cannot pledge freight.

404. One part-owner of a ship, even where he fills the office of ship's husband, has no authority to pledge the freight as against the other part-owners (*n*); though, subject to their rights and to rights of creditors upon the ship, each part-owner may of course pledge his own share.

SECTION XI.

Of Securities by Sellers and Buyers of Goods.

	PARAGRAPH
Pledge by seller remaining in possession	405
Pledge by buyer obtaining possession	406
Effect of transfer of documents of title on vendor's lien or right of stoppage in transitu	407

Pledge by seller remaining in possession.

405. Where a person, having sold goods, continues, or is, in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent,

(*i*) *Bank of Scotland v. Christie*, 8 Cl. & Fin. 214. As to the right of the solvent partner to deal with the partnership property *bonâ fide* and in the ordinary way of business, after the bankruptcy of one partner, see *Lindley on Partnership*, p. 738, ed. 7; *Buckley v. Barber*, 6 Ex. 164.
(*k*) *Steiglitz v. Egginton*, Holt N. P. 141; *Harrison v. Jackson*, 7 T. R. 207.
(*l*) *Lindley on Partnership*, 7th ed., 166.
(*m*) 1906, 2 Ch. 427.
(*n*) *Guion v. Trask*, 1 De G. F. & J. 373.

acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same (o). Paragraphs
405—406

406. Where a person (*p*) having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner (*q*). It has been held that this section does not apply to the case of the common three years' hiring agreement, the hirer not being "a person who has agreed to buy," but only a person with an option to buy (*r*). But on the other hand, where (as sometimes happens) the hirer has no power to determine the hiring, but is obliged to go on until he has acquired the property in the goods, the section applies (*s*). It would seem to be immaterial that the contract for sale does not satisfy the Statute of Frauds (*t*). Pledge by
buyer
obtaining
possession.

(o) Factors Act, 1889, s. 8. As to the law prior to August 10th, 1877, see *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32. But where the goods are not in the seller's possession but in that of a warehouseman for him, the Act does not apply. *Nicholson v. Harper*, [1895] 2 Ch. 415.

(p) Not necessarily a mercantile agent (*Shenstone & Co. v. Hilton*, [1894] 2 Q. B. 452).

(q) Factors Act, 1889, s. 9; and see to same effect, Sale of Goods Act, 1893, s. 47, the words of which are:—"Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that where a document of title to goods has been transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated; and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

(r) *Helby v. Matthews*, [1895] A. C. 471; *Payne v. Wilson*, [1895] 2 Q. B. 537.

(s) *Hull Rope Works Co. v. Adams*, 65 L. J. Q. B. 114; *Lee v. Butler*, [1893] 2 Q. B. 318; dist. in *Helby v. Matthews*, *supra*.

(t) *Hugill v. Masker*, 22 Q. B. D. 364.

Paragraph
407
Effect of
transfer of
documents on
vendor's lien
or right of
stoppage
in transitu.

407. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu*, as the transfer of a bill of lading has for defeating the right of stoppage *in transitu* (u).

(u) Factors Act, 1889, s. 10.

CHAPTER XI.

Of Securities which are Void or Imperfect.

<i>Classification of void or imperfect securities</i>	PARAGRAPH	Paragraph
	408	408
Section I.—Of Securities Void as against Third Parties ..	409—428	
SUB-SECT. (1).—SECURITIES VOID UNDER THE BANK- RUPTCY ACT, 1883	410—418	
,, (2).—SECURITIES VOID UNDER THE STATUTE, 13 ELIZ. C. 5	419—425	
,, (3).—SECURITIES VOID UNDER THE STATUTE, 27 ELIZ. C. 4	426—428	
,, II.—Of Securities Obtained by Misrepresentation, Extortion, or Undue Influence	429—442	
,, III.—Of Securities which are Affected by the Nature of the Consideration	443—452	
,, IV.—Of Securities which are Affected by the Nature of the Security	453—465	
SUB-SECT. (1).—SECURITIES UPON THE PROFITS OF OFFICERS.. .. .	453—457	
,, (2).—SECURITIES UPON ECCLESIASTICAL BENEFICES	458	
,, (3).—SECURITIES UPON PROPERTY FORBIDDEN TO BE INCUMBERED	459—465	

408. A security may be voidable, void, or imperfect :—

1. As against creditors or subsequent mortgagees or purchasers of the mortgagor.
2. As against the mortgagor himself by reason of fraud, extortion, or undue influence.
3. As against the mortgagor himself by reason of its illegal nature.
4. As against the mortgagor himself by reason of the nature of the property mortgaged.

Classification of void or imperfect securities.

A security which is not by its nature *malum in se*, but is only prohibited, is not necessarily void for all purposes, but so far only as it is expressly forbidden. So that although a deed which attempts to create a charge, be (by statute or otherwise) declared to be void, such an instrument may operate in a manner which is not forbidden, viz., by way of personal security for the money which it was attempted to secure by mortgage, or as a security upon something which

Paragraphs
408—409

would lawfully pass by the mortgage: as in the case of an un-registered bill of sale of a ship—by way of assignment of the freight (*a*) (145). And a collateral bond or warrant of attorney, though it purport to be given as a further security for the same debt and recites the principal security, will be good in respect of the personal or other remedies which it gives (*b*). On the other hand, if several securities be given for the performance of a continuing obligation, and one of them be set aside, the whole consideration fails, and the purchase-money may be recovered from the grantor (*c*).

SECTION I.

Of Securities void as against Third Parties.

PARAGRAPH

Securities may be void as against mortgagors, creditors, or subsequent purchasers from him 409

SUB-SECTION (1).—*Securities void under the Bankruptcy Act, 1883.*

<i>Certain voluntary deeds void on bankruptcy of grantor</i>	410
<i>Covenants to settle future property void on bankruptcy of covenantor</i> ..	411
<i>Voluntary settlement of policy of assurance under Married Women's Property Act</i>	412
<i>Securities by way of fraudulent preference</i>	413
<i>No fraudulent preference where valuable consideration and pressure</i> ..	414
<i>Amount of pressure required</i>	415
<i>Assignment of the whole of a debtor's property for an existing debt</i> ..	416
<i>Provisions as to voluntary settlements, etc., apply to liquidations by arrangement</i>	417
<i>Bonâ fide securities without notice of act of bankruptcy are valid</i>	418

SUB-SECTION (2).—*Securities void under 13 Eliz. c. 5.*

<i>General effect of 13 Eliz. c. 5</i>	419
<i>How far statute applies to copyholds and choses in action</i>	420
<i>Statute applies to prospective as well as existing creditors</i>	421
<i>Bonâ fides the principal test of validity</i>	422
<i>Deed not necessarily fraudulent because it assigns all debtor's property</i> ..	423
<i>Fact of grantor retaining possession is evidence of fraudulent intent</i> ..	424
<i>Aliter where deed is mere security</i>	425

SUB-SECTION (3).—*Securities void under 27 Eliz. c. 4.*

<i>Provisions of Act in relation to future purchasers, etc.</i>	426
<i>Formerly every voluntary conveyance was void against subsequent purchasers, but this was altered in 1893</i>	427
<i>Statute operates in favour of subsequent equitable as well as legal purchasers</i> ..	428

Securities
may be void
as against

409. As already stated (76), securities on personal chattels may be void by reason of non-compliance with the provisions of

(a) See *Exp. Jones*, 2 Cr. & J. 513.

(b) *Wynne v. Robinson*, 4 Bl. N. R. 27.

(c) *Scurfield v. Gowland*, 6 East, 241; *Higgins v. Coates*, 5 Q. B. 432.

the Bills of Sale Act; and such securities, and also securities on choses in action, may become nugatory as against the mortgagor's trustee in bankruptcy, where the mortgagor is a trader and the goods are left in his "order and disposition" (124). But, in addition to these express statutory dangers, there are others of a more general nature arising (1) out of the Bankruptcy Act, (2) out of the Statute 13 Eliz. c. 5, and (3) out of the Statute 27 Eliz. c. 4.

Paragraphs
409—411

mortgagor's
creditors or
subsequent
purchasers
from him.

SUB-SECTION (1).—*Securities void under Bankruptcy Act, 1883.*

410. Any settlement (*i.e.*, any conveyance or transfer) of property, not being a settlement made before and in consideration of marriage, or in favour of a purchaser (*i.e.*, a buyer in the ordinary and not a purchaser in the legal sense, (*d*)) or *incumbrancer* in good faith and for valuable consideration, or a settlement made on or for the wife and children of the settlor, of property which has accrued to him after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two years* after the date of the settlement, be void against the trustee in bankruptcy; and also if the settlor becomes bankrupt at any subsequent time *within ten years* after the date of the settlement, unless the parties claiming under it can prove that the settlor, when it was made, was able to pay all his debts without the aid of the settled property, and that the interest of the settlor had passed to the trustee of the settlement on the execution thereof. Although the Act only purports to avoid such settlements, etc., "against the trustee in bankruptcy," yet it does not place that trustee in the place of the grantee whose settlement is made void; and therefore, where the settlor has made a subsequent mortgage of the property for value, the rights of the mortgagee are not merely preserved but accelerated (*e*).

Certain
voluntary
deeds void on
bankruptcy
of grantor.

It will be perceived that this section does not contain any *express* proviso in favour of *bonâ fide* purchasers from persons claiming beneficially under such void settlements. Mr. Justice *Stirling* in one case held that it was doubtful whether any such proviso could be implied (*f*). On the other hand, Mr. (now Lord) Justice *Vaughan Williams* decided that such *bonâ fide* purchasers were protected (*g*); and this view was ultimately adopted by the Court of Appeal (*h*).

411. Any *covenant or contract* made in consideration of marriage, for the future settlement on or for the settlor's wife or children, of any property wherein he had not, at the date of his marriage, any

Covenants
to settle
future
property
void on
bankruptcy of
covenantor.

(*d*) *Exp. Hillman, Re Pumfrey*, 10 Ch. D. 622, under Act of 1869, s. 91.

(*e*) *Sanquinetti v. Stuckey's Banking Co.*, [1895] 1 Ch. 176; 64 L. J. Ch. 181; 71 L. T. 872.

(*f*) *Re Briggs and Spicer*, [1891] 2 Ch. 127.

(*g*) *Re Brall, Exp. Norton*, [1893] 2 Q. B. 381; *Re Vansittart, Exp. Brown*, [1893] 2 Q. B. 377.

(*h*) *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776.

Paragraphs
411—412

estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy (*i*). A settlement with a covenant to pay off a mortgage on the estate is void against the trustee under this section, if the settlor had not sufficient assets to pay the mortgage as well as his other debts (*k*).

This provision (which applies to settlements executed before as well as after the Act came into operation (*l*)) is aimed at the settlement of property which may hereafter accrue to the covenantor, but in which he has no present interest, and does not affect a covenant to pay a sum of money to the trustees of a marriage settlement at a future time (*m*). As to equitable assignments of future acquired property (which until the property is acquired only operate as covenants) by documents other than marriage settlements, see (67).

Voluntary
settlement of
policy of
assurance
under
Married
Women's
Property
Act.

412. The effect of the Bankruptcy Act upon policies of insurance is modified by the Married Women's Property Act, 1882, c. 75, s. 11; which provides that a policy of insurance effected by a married man or woman on his or her own life, and expressed on the face of it to be for the benefit of the other of them, with or without his or her children, or any of them, shall create a trust in favour of the objects therein named; and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts. Provided, that if it shall be proved that the policy was effected, and the premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

In a case which arose out of a corresponding provision in the Married Women's Property Act, 1870, repealed by the above Act, it was held that the Act took out of s. 91 of the Bankruptcy Act, 1869 (which corresponds with s. 47 of the Act of 1883 cited above), an insurance on the life of the husband payable to the separate use of the wife, if she survived him, and the premiums on which had been agreed to be paid out of the wife's separate estate, though the policy was granted on the surrender of a former policy effected for the husband's benefit, because nothing of value had been taken from the creditors (*n*).

(*i*) Bankruptcy Act, 1883, s. 47; see 35 & 36 Vict. c. 58, s. 52 (Bankruptcy (Ireland) Amendment Act, 1872).

(*k*) *Exp. Huxtable, Re Conibeer*, 2 Ch. D. 54, under Act of 1869, s. 91.

(*l*) *Exp. Dawson, Re Dawson*, L. R. 19 Eq. 433 (Act of 1869).

(*m*) *Exp. Bishop, Re Tonnies*, L. R. 8 Ch. 718 (Act of 1869).

(*n*) *Holt v. Everall*, 2 Ch. D. 266.

413. By another provision, the application of which (as it has been intimated) requires that the transaction in question must have been a fraudulent preference under the already existing law, and which, therefore, does not alter the rule as to the nature of the pressure which is sufficient to support a security in favour of a particular creditor (*o*) (**414**), every conveyance or transfer of property or charge thereon, and every payment made and obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own moneys, in favour of any creditor or person in trust for any creditor, *with a view of giving* such creditor a preference over the other creditors, shall, if such person is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be fraudulent and void against the trustee in the bankruptcy; saving, however, the rights of any person making title in good faith and for valuable consideration, through or under a creditor of the bankrupt (*p*).

Paragraphs
413—414

Securities by
way of
fraudulent
preference.

414. An assignment is not fraudulent or void against the bankruptcy laws because it has the effect of delaying a particular creditor, if it be made *bonâ fide* on the demand of a creditor, and for good consideration (*q*), and not for the mere purpose of defeating creditors (*r*). The debtor or his personal representative may, therefore, at any time before execution by a judgment creditor, either secure a more favoured creditor, or provide rateably for all his creditors (*s*); and to support such a transaction, and to rebut the presumption of fraud arising from an apparent want of consideration, evidence of the real circumstances and of the existence of a valuable consideration may be given, provided it do not contradict the allegations of the deed (*t*). The subsequent execution of a security for money, advanced on the faith of an absolute promise to give a bill of sale (especially if on the faith of the promise further advances have been made (*u*)), will be good, if the original transaction be valid (*x*); but a subsequent security, given under a conditional

No
fraudulent
preference
where
valuable
consideration
and pressure.

(*o*) *Exp. Tempest, Re Craven & Marshall*, L. R. 6 Ch. 70 (Act of 1869).

(*p*) Bankruptcy Act, 1883, s. 48; Irish Bankruptcy Act, 1872, c. 58, s. 53. As to the construction of the differently-worded saving clause in s. 22 of the Bankruptcy Act, 1869, see *Exp. Butcher, Re Meldrum*, L. R. 9 Ch. 595.

(*q*) *Darvill v. Terry*, 6 H. & N. 807; *Wood v. Dixie*, 7 Q. B. 892; *Hale v. Saloon Omnibus Co.*, 28 L. J. Ch. 777.

(*r*) *Bott v. Smith*, 21 Beav. 511.

(*s*) *Holbird v. Anderson*, 5 T. R. 235; *Meux v. Howell*, 4 East, 1; *Pickstock v. Lyster*, 3 Mau. & S. 371; *Wolverhampton and Staffordshire Banking Co. v. Marston*, 7 H. & N. 148; see *Evans v. Jones*, 3 H. & C. 423; *Westbury v. Clapp*, 12 W. R. 511; *Gladstone v. Padwick*, L. R. 6 Ex. 203; *per* MARTIN and BRAMWELL, BB.

(*t*) *Gale v. Williamson*, 8 Mee. & W. 405.

(*u*) *Exp. Fisher, Re Ash* L. R. 7 Ch. 636; *Exp. Burton, Re Tunstall*, 13 Ch. D. 102; *Exp. Kilner, Re Barker*, 13 Ch. D. 245; *Re Gibson, Exp. Bolland*, 8 Ch. D. 230.

(*x*) *Hutton v. Cruftwell*, 1 El. & Bl. 15; *Harris v. Rickett*, 4 H. & N. 1; *Exp. Izard, Re Cook*, L. R. 9 Ch. 271; *Exp. Hodgkin, Re Softley*, L. R. 20 Eq. 746.

Paragraphs
414—416

agreement to execute it when required by the creditor, or when, without further consideration, the giving of it has been postponed for the convenience of the debtor, will be considered to be fraudulent.

Amount of
pressure
required.

415. It was formerly considered that, to make valid (under the bankrupt and insolvent Acts) a security by which a particular creditor was preferred, it must have been given under a pressure by the latter, amounting to coercion (*y*). The question, which does not appear to be altered by the Act of 1883 (**412**), is, however, now understood to be, whether the preference were the mere voluntary act of the debtor, or *bonâ fide* required, or originating in a demand, by the creditor (*z*). To be fraudulent, it must be both voluntary and made under circumstances which lead to an inference that it was in contemplation of bankruptcy (*a*). And if the transaction be otherwise *bonâ fide* (*b*), it is not impeachable because the property was delivered by the debtor secretly, to save his credit before the world (*c*); or to avert probable proceedings for misappropriation of trust frauds (*d*).

The circumstance that the creditor is the solicitor of the debtor, does not (*e*) affect the question of fraudulent preference, except so far as it gives facilities for disguising a voluntary transaction under an appearance of demand and submission.

Assignment
of the whole
of a debtor's
property for
an existing
debt.

416. It has been held that an assignment of the whole, or of the whole with a colourable or unsubstantial exception (*f*) of the debtor's property, will be an act of bankruptcy and void in the event of a receiving order being made within three months, if part of the consideration was an existing debt; because it is in effect an assignment of the whole for the price of part (*g*), except where the advance is for the benefit of the estate by relieving it from a charge

(*y*) *Per* Lord CHELMSFORD, C., *Johnson v. Fesemeyer*, 3 De G. & J. at p. 24. See *Cook v. Rogers*, 7 Bing. 438; *Davies v. Acocks*, 2 C. M. & R. 461.

(*z*) *Van Casteel v. Booker*, 2 Ex. 691; *Mogg v. Baker*, 4 Mee. & W. 348; *Johnson v. Fesemeyer*, 3 De G. & J. 13. See *Hale v. Allnutt*, 18 C. B. 505; *Exp. Tempest, Re Craven & Marshall*, L. R. 6 Ch. 70; *Exp. Blackburn, Re Cheesebrough*, L. R. 12 Eq. 358; *Exp. Topham, Re Walker*, L. R. 8 Ch. 614; *Smith v. Pilgrim*, 2 Ch. D. 127; *Exp. Taylor, Re Goldsmid*, 18 Q. B. D. 295.

(*a*) *Brown v. Kempton*, 19 L. J. C. P. 169; *Shrubsole v. Sussams*, 16 C. B. (N.S.) at p. 459; *per* WILLES, J.

(*b*) See *Exp. Reader, Re Wrigley*, L. R. 20 Eq. 763.

(*c*) *Crosby v. Crouch*, 11 East, 256.

(*d*) *New Prince & Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19; *aff. sub nomine Sharp v. Jackson*, [1899] A. C. 419; *Hermoux v. Harbord*, 14 T. L. R. 243.

(*e*) *Johnson v. Fesemeyer*, 3 De G. & J. 13; 25 Beav. 88 (*sub nomine Johnson v. Fesemeyer*).

(*f*) *Lindon v. Sharp*, 6 Man. & Gr. 895; *Dutton v. Morrison*, 17 Ves. 193; *Exp. Bailey*, 3 De G. M. & G. 534; *Exp. Bland*, 6 De G. M. & G. 757; *Exp. Dann, Re Parker*, 17 Ch. D. 26; *aliter* where there is a substantial exception. *Exp. Hawker, Re Keely*, L. R. 7 Ch. 214.

(*g*) *Graham v. Chapman*, 12 C. B. 85. In this case the transfer also gave the transferee a right to seize the future acquired property of the transferor. *Lacon v. Liffen*, 32 L. J. Ch. 315; *Exp. Hawker, Re Keely*, L. R. 7 Ch. 214; *Re Wood, Exp. Luckes*, L. R. 7 Ch. 302.

already existing (*h*). But in several cases it has been laid down that an assignment, in consideration of an existing debt, is not necessarily an act of bankruptcy; and the question appears to be whether fraud was intended, or under the circumstances must be inferred (*i*). The result of the authorities has been stated to be, that where a debtor assigns his whole property as security for a past debt *only*, it is an act of bankruptcy, whatever the motives of the parties may have been; and if there was also a further advance, the question is not whether it was great or small, but whether there was a *bonâ fide* intention of carrying on the business (*k*). But although the question of the amount of the further advance is not the crucial point, yet a substantial advance of money, or the release from a lien, of goods in which the debtor deals, and the possession of which enables him to continue his business, is considered to place the matter on the same footing, as the exception from the assignment of a substantial part of the debtor's property (*l*); and the small proportion of the advance to the value of the property pledged, being considered in determining the object and *bonâ fides* of the pledge, but not being taken as conclusive evidence of fraud (*m*).

The withdrawal or the non-issue of an execution on a promise to give security if no execution be issued, or forbearance to take possession of the grantor's goods under a bill of sale, will not alone be a sufficient equivalent (*n*).

The discharge of an existing security, made in contemplation of bankruptcy, will be fraudulent, if it prevent an equal distribution of the property, although the creditor discharged derived no benefit from the payment; as where the discharge was only for the advantage of the bankrupt and his wife (*o*). Evidence may be given of the effect of the deed (*p*), where it does not in terms assign all the property of the debtor; and although all of it be assigned, the assignment may be good if the lender did not actually know, and had

(*h*) *Whitmore v. Claridge*, 31 L. J. Q. B. 141; 33 L. J. Q. B. 87.

(*i*) *Bell v. Simpson*, 2 H. & N. 410; *Pennell v. Reynolds*, 11 C. B. (N.S.) 709; *Smith v. Timms*, 1 H. & C. 849; see *Hale v. Allnutt*, 18 C. B. 505; *Exp. Hauxwell, Re Hemingway*, 23 Ch. D. 626.

(*k*) *Exp. Ellis, Re Ellis*, 2 Ch. D. 797, per MELLISH, L.J., and see *Exp. Cohen, Re Sparke*, L. R. 7 Ch. 20; *Young v. Waud*, 8 Ex. 221; *Baxter v. Pritchard*, 1 Ad. & El. 456; *Rose v. Haycock*, 1 Ad. & El. 460, n.; *Hutton v. Crutwell*, 1 El. & Bl. 15; *Bittlestone v. Cooke*, 6 El. & Bl. 296; *Mercer v. Peterson*, L. R. 2 Ex. 304; L. R. 3 Ex. 104; *Lomax v. Buxton*, L. R. 6 C. P. 107; *Exp. Winder, Re Winstanley*, 1 Ch. D. 290; *Exp. King, Re King*, 2 Ch. D. 256.

(*l*) Per WILLES, J., *Pennell v. Reynolds*, 11 C. B. (N.S.) 709; *Shrubsole v. Sussams*, 16 C. B. (N.S.) 452; *Lomax v. Buxton*, L. R. 6 C. P. 107; *Allen v. Bonnett*, L. R. 5 Ch. 577; see *Exp. Reed and Steel, Re Tweddell*, L. R. 14 Eq. 586; *Exp. Threlfall, Re Williamson*, 46 L. J. Bk. 8.

(*m*) Per ERLE, J., *Graham v. Chapman*, 12 C. B. 85; *Exp. Fisher, Re Ash*, L. R. 7 Ch. 636.

(*n*) *Woodhouse v. Murray*, L. R. 2 Q. B. 634; L. R. 4 Q. B. 27.

(*o*) *Marshall v. Lambe*, 5 Q. B. 115.

(*p*) *Lindon v. Sharpe*, 6 Man. & Gr. 895.

Paragraphs
416—418

not, from the nature of the transaction, notice, that the object was to defeat and delay the creditors of the assignor (*q*). As to the effect of a power contained in such an assignment for the assignee to carry on the debtor's trade, see and compare *Janes v. Whitbread* (*r*), and *Owen v. Body* (*s*).

Where the vendor of goods, in whose hands the documents of title are left by the purchaser, pledges them and becomes bankrupt, they are not in his possession within the Act, because he cannot obtain them without paying the pledgee's debt (*t*).

Provisions as
to voluntary
settlements,
etc., apply to
liquidations
by arrange-
ment.

417. Under s. 18 (13) the above provisions will apply to cases of liquidation by arrangement, as the corresponding sections 91 and 92 of the Act of 1869 applied to arrangements by virtue of that Act under which it was held that a transaction was equally voidable under the bankruptcy laws, whether the goods have been retained by the transferee under the fraudulent assignment, or had been sold, and although the adjudication was obtained on the petition of the bankrupt himself (*u*).

Bonâ fide
securities
without
notice of act
of bank-
ruptcy are
valid.

418. Subject to the foregoing provisions, the Act of 1883 does not invalidate any conveyance or assignment by, or any contract dealing, or transaction (*x*) by or with, the bankrupt before the date of the receiving order, and without notice to the person dealing with the bankrupt of any available act of bankruptcy committed by the bankrupt before that time (*y*). But where a mortgagee takes with such notice, and a receiving order is made within three months after such act of bankruptcy, his security will be void (*z*). The Act does not invalidate a *bonâ fide* transaction with an undischarged bankrupt in respect of after acquired personal property (including leaseholds), even with notice of the bankruptcy, unless the trustee intervenes (*a*). But this has no application to real estate (*b*), whether the bankrupt's interest be legal or equitable (*c*). On the other hand, a bankrupt's interest in real estate purchased by him and another as partners for partnership purposes, being in fact personal

(*q*) *Per* WILLES, J., *Pennell v. Reynolds*, 11 C. B. (N.S.) 709; *Re Colemere*, L. R. 1 Ch. 128.

(*r*) 11 C. B. 406.

(*s*) 5 Ad. & El. 28.

(*t*) *Greening v. Clark*, 4 B. & C. 316.

(*u*) *Marks v. Feldman*, L. R. 5 Q. B. 275.

(*x*) *Ex. gr.*, a further advance on mortgage of a ship. *The Thames*, 63 L. T. 353. See also *The Ruby*, 83 L. T. 438.

(*y*) Act of 1883, s. 49, founded on s. 95 of Act of 1869, and see *Re Seaman : Exp. Furness Finance Co., Ltd.*, [1896] 1 Q. B. 412.

(*z*) *Re O'Shea's Settlement, Courage v. O'Shea*, [1895] 1 Ch. 325.

(*a*) *Cohen v. Mitchell*, 25 Q. B. D. 262; *Re Clayton and Barclay's Contract*, [1895] 2 Ch. 212.

(*b*) *London and County Contracts, Ltd. v. Tallack*, 51 W. R. 408.

(*c*) *Official Receiver v. Cooke*, [1906] 2 Ch. 661.

property is within the scope of the Act (*d*). It was held under the Act of 1869 that a transaction *in invitum*, (such as an attachment of a debt due to the bankrupt,) was not “a dealing” within the corresponding provision of that Act (*e*).

Paragraphs
418—420

SUB-SECTION (2).—*Securities void under 13 Eliz. c. 5.*

419. By the statute 13 Eliz. c. 5, s. 2, every feoffment and conveyance of lands, tenements, hereditaments, goods and chattels, or of any lease, rent, common, or other profit or charge thereon, by writing or otherwise, and every bond, suit, judgment, and execution had or made for any intent or purpose to delay, hinder, or defraud *creditors* and others of their just debts, rights, and remedies, are declared only as against the persons or their representatives whose remedies are disturbed, hindered, delayed, or defrauded, to be clearly and utterly void, frustrate, and of none effect. And accordingly, both at law (*f*) and in equity (*g*), so far as regards the rights of the creditors, the matter is treated as if the fraudulent conveyance had never existed. A suit to set aside such a deed is not barred by any delay short of the period prescribed by the Statute of Limitations (*h*).

General effect
of 13 Eliz.
c. 5.

The Act, however, does not extend to any estate or interest (*i*) conveyed or assured upon good consideration and *bonâ fide*, to any person or persons not having, at the time of the conveyance, notice of the fraud or collusion (*k*). An assignee who stands in that position will, therefore, have priority over the creditors of the maker of the fraudulent assignment (*l*).

420. The statute 13 Eliz. c. 5 did not of its own force apply copyholds, unless by tenure or special custom they were subject to debts (*m*); nor to choses in action. But such choses in action as, by virtue of 1 & 2 Vict. c. 110, s. 12, may be taken in execution now fall within the statute 13 Elizabeth (*n*); and even before the passing of 1 & 2 Vict., after the death of the debtor, when the creditors might reach all the personal property, and during his life,

How far
statute
applies to
copyholds
and choses
in action.

(*d*) *Re Kent County Gaslight & Coke Co., Ltd.*, [1909] 2 Ch. 195.

(*e*) *Exp. Pillers, Re Curtoys*, 17 Ch. D. 653.

(*f*) See *per Lord TENTERDEN, Shears v. Rogers*, 3 B. & Ad. 362, 369.

(*g*) *Per KINDERSLEY, V.-C., Hue v. French*, 26 L. J. Ch. 317.

(*h*) *Re Maddever, Three Towns Banking Co. v. Maddever*, 27 Ch. D. 523.

(*i*) This protection extends to purchasers or mortgagees of mere equitable interests. *Halifax Joint Stock Banking Co. v. Gledhill*, [1891] 1 Ch. 31.

(*k*) 13 Eliz. c. 5. Sect. 6.

(*l*) *Morewood v. South Yorkshire Rail. Co.*, 3 H. & N. 798; *Middleton v. Pollock*, 2 Ch. D. 104.

(*m*) *Mathews v. Feaver*, 1 Cox, 272. But copyholds are now included by the effect of 1 & 2 Vict. c. 110, s. 11.

(*n*) *Barrack v. M'Culloch*, 3 K. & J. 110. And see *French v. French*, 6 De G. M. & G. 95; and *Sims v. Thomas*, 12 Ad. & El. at p. 554, *per Lord DENMAN*. And see *Bolland v. Young*, [1904] 2 K. B. 824; *Ideal Bedding Co., Ltd. v. Holland*, [1907] 2 Ch. 157; *Re Mouat, Kingston Cotton Mills Co., Ltd. v. Mouat*, [1899] 1 Ch. 831.

Paragraphs
420—422

when, by reason of his insolvency, all his property became subject to the payment of his debts, the statute applied (*o*). So it appears to be in bankruptcy as to property which cannot be taken in execution under 1 & 2 Vict. c. 110; and in like manner it seems that copyholds, which are now subject to execution, have been brought within the statute (*p*). Nor can a debtor affect the creditor's right, by settling the proceeds of the assignment upon his wife and family, this being an application of the money to his own purposes and a fraud against the creditors (*q*).

To enable a living creditor to sue under the statute for the purpose of setting aside a deed, it is not necessary that he should first obtain a charging order or other lien upon the property, although, without taking the necessary proceedings to obtain such a lien, he cannot have relief against the property (*r*).

Statute
applies to
prospective
as well as
existing
creditors.

421. It was held at law (*s*), that an assignment of the debtor's goods is not void against a person who only became a creditor after the date of the assignment. In equity, on the other hand (*t*), the statute is applied to the defeating of prospective, as well as of existing debts; on the ground that the transaction is fraudulent if done with a view to future indebtedness. And the statute has, therefore, been held to avoid a conveyance of the grantor's property made shortly before the trial of an action in which he was defendant, and the object of which was inferred to be the defeat of an anticipated judgment debt, or a provision against the risk of an intended hazardous trade. But the rule has been modified where the assignment was made under ordinary circumstances before the debt accrued; on the consideration that there can be no fraudulent intent to support a suit by a subsequent creditor, unless a debt due at the date of the assignment be still subsisting (*u*); although, as a person delayed by the voluntary gift, he is entitled to participate in the assigned property when the assignment has been set aside (*x*).

Bonâ fides
the principal
test of
validity.

422. The *bonâ fides* of a transaction is the principal test of its validity under the statute of 13 Elizabeth. If this quality be wanting it has been said (*y*) that even the payment of a full valuable

(*o*) *Norcutt v. Dodd*, Cr. & Ph. 100.

(*p*) See Smith's Leading Cases, vol. i., p. 23, ed. 6.

(*q*) *French v. French*, 6 De G. M. & G. 95; *Hue v. French*, 26 L. J. Ch. 317; *Neale v. Day*, 28 L. J. Ch. 45.

(*r*) *Goldsmith v. Russell*, 5 De G. M. & G. 547; *Reese River Silver Mining Co. v. Atwell*, L. R. 7 Eq. 347.

(*s*) *Oswald v. Thompson*, 2 Ex. 215. But see *Graham v. Furber*, 14 C. B. 410, per WILLIAMS, J.

(*t*) *Stileman v. Ashdown*, 2 Atk. 477; *Tarback v. Marbury*, 2 Vern. 509; *Barling v. Bishopp*, 29 Beav. 417; *Mackay v. Douglas*, L. R. 14 Eq. 106; *Freeman v. Pope*, L. R. 5 Ch. 538. See per WOOD, V.-C., *Holmes v. Penney*, 3 K. & J. at p. 100.

(*u*) *Jenkyn v. Vaughan*, 3 Drew. 419; but see *Spirett v. Willows*, 5 Giff. 49; 3 De G. J. & S. 293.

(*x*) *Barton v. Vanheythuysen*, 11 Hare, 126.

(*y*) Per Lord MANSFIELD, *Cadogan v. Kennett*, Cowp. 432.

consideration, with change of possession, will not make it good. On the other hand, the fact that the transaction has had the effect of defeating or delaying creditors is not sufficient to invalidate it, if it was, in its inception, *bonâ fide* (z). Paragraphs
422—423

A fraudulent intention on the part of the assignor may be *primâ facie* inferred from various circumstances. His indebtedness at the time of the transaction is an important consideration, though not absolutely decisive of the validity of the voluntary conveyance; for there may be insolvency without fraud, and the deed may be good though the grantor be indebted. As a general rule the transaction will be void, if it appear that there was an intention to defeat or delay the creditors, though no actual delay be caused; or if the debtor knew that delay would be the consequence of the transaction (a); and there will be a *primâ facie* inference of such intention where the settlement is voluntary, and the plaintiff was a creditor at its date, if the effect of it was to take from the settlor's property an amount without which his debts cannot be paid (b). This inference was for some years considered to be irrebutable, but recent decisions of the Court of Appeal have shown that it is at most a rule affecting the onus of proof, and that the mere fact that an assignment or security is voluntary is not conclusive evidence of an intention to defeat or delay creditors within this Act (c). A deed will also be invalid if it contain arrangements which prevent creditors from using their ordinary remedies, and compel them to come in under a scheme on pain of losing their dividend (d). The insolvency of the grantor shortly after the date of the conveyance will throw upon those who uphold it the burden of showing that the grantor was in a position to make it (e). But when the settlement is for valuable consideration, evidence must be given of circumstances which *show* an intent to defeat or delay creditors (f).

423. A deed is not fraudulent under 13 Eliz. because it is an assignment even of the whole of the grantor's property for the Deed not
necessarily
fraudulent

(z) *Re Lane-Fox, Exp. Gimblett*, [1900] 2 Q. B. 508.

(a) *Richardson v. Smallwood*, Jac. 552; *Townsend v. Westacott*, 2 Beav. 340; *Thompson v. Webster*, 5 Jur. (N.S.) 668, 921; 7 Jur. (N.S.) 531; *French v. French*, 6 De G. M. & G. 95; *Holmes v. Penney*, 3 K. & J. 90; *Aldred v. Constable*, 4 Q. B. 674; *Exp. Mayou*, 11 Jur. (N.S.) 433; *Re Pearson, Exp. Stephens*, 3 Ch. D. 807; *Re Ridler, Ridler v. Ridler*, 22 Ch. D. 74.

(b) *Freeman v. Pope*, L. R. 5 Ch. 538, *per* Lord HATHERLEY; *Jenkyn v. Vaughan*, 3 Drew, 419, *per* KINDERSLEY, V. C. *Ideal Bedding Co., Ltd. v. Holland*, [1907] 2 Ch. 157.

(c) *Exp. Mercer, Re Wise*, 17 Q. B. D. 290; *Exp. Home, Re Home*, 54 L. T. 301; *Godfrey v. Poole*, 13 App. Cas. 497; and see *Le Lievre v. Gould*, [1893] 1 Q. B. at p. 500. *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

(d) *Spenser v. Slater*, 4 Q. B. D. 13; distinguishing *Boldero v. London and Westminster Loan and Discount Co.*, 5 Ex. D. 47.

(e) *Crossley v. Elsworth*, L. R. 12 Eq. 158; *Mackay v. Douglas*, L. R. 14 Eq. 106.

(f) *Per* Lord HATHERLEY, *Freeman v. Pope*, L. R. 5 Ch. 538; *Exp. Games, Re Bamford*, 12 Ch. D. 314; see *Kent v. Riley*, L. R. 14 Eq. 190; *Re Johnson, Golden v. Gillam*, 20 Ch. D. 389.

Paragraphs
423—425

because it
assigns all
debtor's
property.

Fact of
grantor
retaining
possession is
evidence of
fraudulent
intent.

benefit of particular creditors (*g*). But, as has been above stated (416), an assignment by the debtor of the whole, or of the whole with an unsubstantial or colourable exception, of his property, is an *act of bankruptcy*.

424. The possession and reputed ownership by the debtor of chattels after an alleged *absolute* assignment by him, or after they have been taken in execution by the creditor, has from an early period been treated (*h*) as a badge or as evidence of fraud under this statute, because possession is the chief test of the ownership of chattels, and by means of it the debtor acquires a credit to which his real circumstances do not entitle him. This inference of fraud also arises as to real estate, when the assignor retains the possession of the title deeds (*i*). Possession by the assignor is not, however, considered to be fraudulent, where delivery to the assignee would be inconsistent with the terms or object of the transaction. If, therefore (as usually happens in the case of mortgages of land or choses in action), a security be made conditional, the grantor's continuance in possession will not (apart, in the case of choses in action mortgaged by traders, from the order and disposition clause of the Bankruptcy Act (124)) avoid it; because the grantee is not to have possession until he has performed the condition (*k*). And if a mortgage deed be duly executed and delivered, the mere retainer of it without fraud by a grantor then solvent, will not avoid it, under 13 Eliz. c. 5, as against his creditors (*l*). But, if the security be absolute in form, with an agreement that the debtor shall remain in possession for a limited time, or that it shall be void on payment at a future day, it will be, according to some authorities, bad, or at all events evidence of intent to defeat or delay creditors, unless the grantee take possession as if there were no such provision (*m*).

Aliter, where
deed a mere
security.

425. Nor is it an objection to the validity of the deed, that the debtor is allowed by the assignee to remain in the apparent possession of and to use the property, where the ownership and actual possession of it is notorious (*n*); nor, as between the contracting parties, that the assignee lends the goods, or lets them on hire to the debtor, if they were publicly purchased and a bill of sale was taken

(*g*) *Alton v. Harrison*, L. R. 4 Ch. 622; *Middleton v. Pollock*, 2 Ch. D. 104; *Exp. Games, Re Bamford*, 12 Ch. D. 314.

(*h*) *Twyne's case*, 3 Rep. 80; *West v. Skip*, 1 Ves. sen. 240.

(*i*) *Doe d. Grimsby v. Ball*, 11 Mee. & W. 531; and see *Perry-Herrick v. Attwood*, 2 De G. & J. 21.

(*k*) *Edwards v. Harben*, 2 T. R. 587; *Martindale v. Booth*, 3 B. & Ad. 498; *Meggot v. Mills*, 1 Raym. 286; and see *Cadogan v. Kennett*, Cowp. 432; *Reed v. Wilmot*, 7 Bing. 577; and see *Re Cook, Morris v. Morris* [1895] A. C. 625.

(*l*) *Exton v. Scott*, 6 Sim. 31.

(*m*) *Edwards v. Harben*, *supra*; — *v. Cramphorne*, 3 L. J. (o.s.) Ch. 223; 6 L. J. (o.s.) Ch. 91.

(*n*) *Latimer v. Batson*, 4 B. & C. 652; see *Leonard v. Baker*, 1 Mau. & S. 251.

from the sheriff (*o*) ; nor that the debtor retains the actual possession by agreement for a temporary purpose and as the servant of the assignee (*p*) ; though the latter cannot complete his title by making the assignor his agent *for the purpose* of taking and holding possession (*q*). The assignor may also retain the possession when the subject of the assignment is a chattel annexed to the land, and as such distinguishable from goods of which the property usually accompanies the possession (69) ; or when the assignee cannot conveniently obtain possession (*r*). Neither is the possession of the assignor fraudulent where he is tenant in common with the purchaser, because the possession of one tenant in common is the possession of all (*s*). Moreover, it is unnecessary that the assignment of the chattels should be followed by possession in order to make it valid against the assignor himself, or against his creditors who are cognizant of and take part in the arrangement under which it is made, or which proceeded upon the assumption of its validity ; or against strangers (*t*) ; though it seems that a stranger may afterwards become a creditor under such circumstances that he will have an equity to set aside the assignment (*u*). And a merely fictitious sale without assignment, made to avoid an execution, and resting only upon a receipt for money and a delivery of the goods, will not pass the property in them, and may be avoided even by the debtor (*x*).

Paragraphs
425—426

SUB-SECTION (3).—*Securities void under 27 Eliz. c. 4.*

426. By the statute 27 Eliz. c. 4. s. 2 (made perpetual by 39 Eliz. c. 18, ss. 19, 31, 32), every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use, of, in, or out of any lands, tenements, or other hereditaments, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall afterwards purchase in fee simple, fee tail, for life, lives or years, the same lands, tenements, and hereditaments, or any part thereof, or any rent, profit, or commodity in or out of the same or any part thereof, are declared void as against *purchasers* for money or good consideration, and

Provisions of
Act in
relation to
future
purchasers,
etc.

(*o*) *Kidd v. Rawlinson*, 3 B. & P. 59 ; *Watkins v. Birch*, 4 Taunt. 823 ; see *Jezeph v. Ingram*, 8 Taunt. 838 ; *Cook v. Walker*, 3 W. R. 357.

(*p*) *Reeves v. Capper*, 5 Bing. N. C. 136.

(*q*) *Holroyd v. Marshall*, 10 H. L. C. 191.

(*r*) *Steward v. Lombe*, 1 Bro. & B. 506.

(*s*) *Re Mathews*, 1 Atk. 185.

(*t*) *Steel v. Brown*, 1 Taunt. 381 ; *Robinson v. M'Donnell*, 2 B. & Ald. 134 ; *Bessey v. Windham*, 6 Q. B. 166 ; *White v. Morris*, 11 C. B. 1015 ; *Olliver v. King*, 8 De G. M. & G. 110.

(*u*) See *per* Sir T. PLUMER, *Richardson v. Smallwood*, Jac. 556 ; *per* WOOD, V.-C., *Holmes v. Penney*, 3 K. & J. at p. 100.

(*x*) *Bowes v. Foster*, 2 H. & N. 779.

Paragraphs
426—428

persons claiming under them (428), saving, however (*y*), all estates in and assurances of lands made for good consideration, and *bonâ fide*. And (*z*) every conveyance or assurance of lands with a clause of revocation is declared to be void as against a subsequent assurance of the same hereditaments or any part thereof made without exercise of the power of revocation for money or other good consideration. Provided that no lawful mortgage made *bonâ fide* without fraud, upon good consideration, shall be impeached by force of the Act (*a*).

Formerly
every
voluntary
conveyance
was void
against
subsequent
purchasers,
but this
altered in
1893.

427. Although the statute does not in any way speak of voluntary conveyances, it was for nearly three hundred years held, in a long line of decisions, that every voluntary conveyance or settlement (including, of course, securities) was impliedly fraudulent within the statute as against subsequent purchasers, even although no actual intention to defraud existed at the date of such settlement or conveyance. This was purely judge-made law, and rested on the theory that, by selling the property afterwards for valuable consideration, the settlor or grantor so completely repudiated the former voluntary settlement as to raise the irrebutable presumption that he had the same intention when he made it (*b*). This view of the law has now been reversed by Parliament by 56 & 57 Vict. c. 21, which declares that “no voluntary conveyance of any lands, tenements or hereditaments, *whether made before or after the passing of this Act*, if in fact made *bonâ fide*, and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act, 27th Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding.”

This Act does not extend to cases where the subsequent purchase for value has been made before June 29th, 1893; but although this provision makes the old law relevant in relation to titles to real estate, it is apprehended that, so far as the law of mortgages is concerned, this old law is merely of academic interest, and it is therefore omitted in this work (*c*).

To avoid a settlement, conveyance or security, under this Act, therefore, actual intent to defeat or delay subsequent purchasers is now essential.

Statute
operates in
favour of
subsequent

428. It was held at law, that an equitable mortgagee by deposit, having only a right to go to equity for a legal conveyance, is not a purchaser within the Act of 27 Eliz. (*d*). But in equity it is

(*y*) Sect. 4.

(*z*) Sect. 5.

(*a*) Sect. 6.

(*b*) See *per* CAMPBELL, C.J., *Doe v. Rusham*, 17 Q. B. 723.

(*c*) The reader who desires to refer to the former law is directed to May's Fraudulent Conveyances.

(*d*) *Kerrison v. Dorrien*, 9 Bing. 76.

considered (e) that the purchaser of an equitable estate ought to be no more affected by a voluntary conveyance than the purchaser of a legal estate ; and therefore (f), a mortgagee, by deposit of title deeds, with an undertaking to execute a legal mortgage (or, it is conceived, without such an undertaking), is a purchaser within the statute.

Paragraphs
428—430

equitable as
well as legal
purchasers.

SECTION II.

Of Securities Obtained by Misrepresentation,
Extortion, or Undue Influence.

	PARAGRAPH
<i>General jurisdiction of the court</i>	429
<i>Bristol bargains</i>	430
<i>Interference by court under Moneylenders Act, 1900</i>	431
<i>Jurisdiction of Court to interfere on ground of extortion</i>	432
<i>Clogging or fettering the equity not allowed</i>	433
<i>Securities granted on inadequate grounds to persons holding fiduciary positions</i>	434
<i>Security granted by expectant heirs and reversioners</i>	435
<i>Settlements on wife and children by expectant heirs good</i>	436
<i>An equitable sale will be treated as a mortgage</i>	437
<i>Similar course pursued by courts of law in relation to debts recovered by warrant of attorney for larger sums</i>	438
<i>Solicitors taking mortgages from clients</i>	439
<i>Assignments of subject of suit to solicitors</i>	440
<i>Rules of equity as to securities given by client to solicitor</i>	441
<i>Security for costs not yet incurred</i>	442

429. Another kind of imperfection in securities will arise where the security has been obtained from the mortgagor by threats or false representations ; as in the case of a security for a debt for which the mortgagee untruly represented that he was liable as the mortgagor's surety, although the representation was made without an improper motive (g). Or where the security contains extortionate provisions, from the effect of which the mortgagor may be relieved upon equitable terms ; or where the mortgagee has either exacted unconscionable advantages, or has improperly clogged the right of redemption (7). But a man who from over confidence in his sale executes a mortgage not realizing that it is a mortgage, although conscious that he was dealing with the property comprised in it, will be bound as against innocent mortgagees (h).

General
jurisdiction
of the court.

430. In the exercise of this jurisdiction the court formerly interfered with an oppressive kind of security called a Bristol

Bristol
bargains.

(e) *Buckle v. Mitchell*, 18 Ves. 100.
(f) *Lister v. Turner*, 5 Hare, at p. 291.
(g) *Bloomfield v. Blake*, 6 Car. & P. 75 ; *Lake v. Brutton*, 8 De G. M. & G. 440.
If the security consists of chattels, the debtor may recover them in trover. (*Bloomfield v. Blake*, *supra*.)
(h) *King v. Smith*, [1900] 2 Ch. 425.

Paragraphs
430—431

bargain, by which the debt and interest were to be repaid by instalments, at the rate of 20*l.* per annum for seven years for every 100*l.* advanced, up to which point the security was allowed, the rate of interest being then 6*l.* per cent. But when it was attempted to increase the number of annual instalments to eight, it was declared that the agreement was against conscience, and that if allowed it might be carried on without stint or bounds; and redemption was decreed on the usual terms of paying principal and interest (*i*). And Sir John Power, M.R., said he thought the court would relieve against an ordinary Bristol bargain, viz., the repayment by seven yearly instalments (*k*). This jurisdiction was partly founded upon the laws against usury, and therefore did not apply to mere cases of excessive interest, in which extraordinary risk was incurred; which always justified, as it still justifies, the taking a security for interest beyond the usual rate, and even for a much larger principal sum than was really lent (*l*).

Court will
not interfere
with
excessive
interest
where
extra-
ordinary risk
incurred by
mortgagee.

431. But although the mortgagee acquired by the repeal of the usury laws the power of demanding any amount of interest, yet the effect of that repeal has been considerably modified (1) by the Money Lenders Act, 1900 (*m*), and (2) by the inherent power of the court over oppressive securities. By the last-mentioned Act professional money lenders (who are defined by section 6 (*n*)) have to be registered, and by section 1 relief may be given in any section (whether by lender or borrower) to a borrower where there is evidence which satisfies the court (1) that the interest charged is excessive, or (2) that the amounts charged for expenses, fines, injuries, bonus, premium, renewals, or other charges are excessive, and that in either case the transaction is harsh and unconscionable (*o*) or (*p*) is otherwise such that a court of equity would give relief. In such cases the court may reopen the transaction and take an account between the money lender and the borrower, and may, notwithstanding any

(*i*) *James v. Oades*, 2 Vern. 402.

(*k*) *Fulthorpe v. Foster*, 1 Vern. 476.

(*l*) *Potter v. Edwards*, 26 L. J. Ch. 468; *Mainland v. Upjohn*, 41 Ch. D. 126; but see *Marquis of Northampton v. Pollock*, 45 Ch. D. 190; and *James v. Kerr*, 40 Ch. D. 449.

(*m*) 63 & 64 Vict. c. 51.

(*n*) For cases on the construction of this expression see *Litchfield v. Dreyfus*, [1906] 1 K. B. 584, and *Furber v. Fieldings, Limited*, 23 T. L. R. 362.

(*o*) For instances of what is harsh and unconscionable see *Bonnard v. Doti*, [1906] 1 Ch. 740; *Levene v. Greenwood*, 20 T. L. R. 389; *Wells v. Joyce*, [1905] 2 Ir. R. 134; *Poncione v. Higgins*, 21 T. L. R. 11; *Samuel v. Bell*, 22 T. L. R. 118; *Part v. Bond*, 94 L. T. 490; 22 T. L. R. 253; *Carringtons, Ltd. v. Smith*, [1906] 1 K. B. 79; *Levene v. Titchener*, 23 T. L. R. 508.

(*p*) This phrase is alternative so that if the transaction is harsh and oppressive it need not be of such a nature that apart from the Act a Court of Equity would give relief (*Re A Debtor, Exp. The Debtor*, [1903] 1 K. B. 705; *Samuel v. Newbold*, [1906] A. C. 461).

statement or settlement of account or any agreement purporting to close previous dealings, and create a new obligation, reopen any account already taken, and relieve the borrower from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges as the court having regard to the risk and all the circumstances (*q*), may adjudge to be reasonable, and if any such excess has been paid or allowed in account by the debtor, may order the creditor to repay it, and may set aside either wholly or in part or revise or alter any security given or agreement made in respect of money lent by the money lender, and if the money lender has parted with his security, may order him to indemnify the borrower or person sued. Although the statute only purports to impose penalties for non-registration of moneylenders, the courts have held that non-registration also renders all money lending contracts and securities void, and that the debtor is entitled to sue for their return (*r*) upon his repaying the money borrowed (*s*); or even without (*t*).

Paragraphs
431—433

432. Apart from the Moneylenders Act, 1900, courts of equity have always exercised the power of setting aside or modifying oppressive and extortionate securities on equitable terms; and this jurisdiction has not been lessened by the enactment (*u*) that no purchase made *bonâ fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate shall be opened or set aside *merely* on the ground of under value. The interference of the Court has been mainly directed (1) to cases in which the mortgagee has stipulated for some undue collateral advantage beyond the security for his principal money and interest, and (2) to securities taken from expectant heirs or reversioners, or persons in great straits for money, especially if in weak health (*v*).

433. From the doctrine of courts of equity, that a mere security for a debt cannot be forfeited by non-payment on the stipulated day, was deduced the corollary, that not only should no stipulation to the contrary in or contemporaneously with the mortgage (*x*) be

Clogging or
fettering
equity not
allowed.

(*q*) Even interest at the rate of 40% per annum may not be extreme under the circumstances (see *Oakes v. Green*, 23 T. L. R. 560).

(*r*) *Victorian Daylesford Syndicate v. Dott*, [1905] 2 Ch. 624; *Bonnard v. Dott*, [1906] 1 Ch. 740.

(*s*) *Lodge v. National Union Investment Co.*, [1907] 1 Ch. 300.

(*t*) *Chapman v. Michaelson*, [1909] 1 Ch. 238.

(*u*) 31 Vict. c. 4.

(*v*) See *per* TURNER, L.J., *Croft v. Graham*, 2 De G. J. & S. 155; *Emmett v. Tottenham*, 12 L. T. (N.S.) 838; *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 6 Ch. 665; *Re Slater's Trusts*, 11 Ch. D. 227; *Rae v. Joyce*, 29 L. R. Ir. 500.

(*x*) See *Reeve v. Lisle*, [1902] A. C. 461, where an agreement made subsequently to the mortgage giving the mortgagee an option to purchase was upheld, and see also to same effect, *Maxwell v. Tipping*, [1903] 1 Ir. R. 499.

Paragraph
433

of any validity, but that any attempt to clog or fetter the right of redemption by a provision which would encumber the property, or give the mortgagee any beneficial interest in it *after redemption*, should be equally void. Thus, a covenant by a publican, in a mortgage by him to a brewer, that he will for a period *which may exceed the duration of the mortgage*, purchase from the mortgagee all the ale required in the public-house, is void as a clog or fetter on the equity of redemption. For if it were permitted, the mortgagor would not, on redemption, get back his property in the same state as it was in at the date of the mortgage, but would only get it subject to the onerous obligation to purchase all his stock in trade from the mortgagee. In other words, a public-house which, at the date of the mortgage, is a "free house," must be redeemable as such, and must not, as part of the terms of the loan, be converted into a "tied house" (y). For the same reason, a stipulation in a mortgage deed giving the mortgagee the option of purchasing the equity of redemption at a specified price, is invalid (z).

No longer any
objection to
reasonable
collateral
advantage.

On the other hand, contrary to the older cases, it is now settled that there is no objection to a stipulation in a mortgage deed giving the mortgagee some collateral advantage in addition to the security for his money, so long as it is not unconscionable, and does not bind the property when the mortgage is redeemed; and such a stipulation if negative in substance is binding on the assigns and tenants of the mortgagor who take with notice of it (a). Thus, in *Biggs v. Hoddinott* (b), referred to with approval in *Noakes & Co. Ltd. v. Rice* (y), it was held that a covenant (in a mortgage to a brewer), that the mortgagor would purchase all his ale from the brewer *during the continuance of the security*, was unobjectionable; for it was not unreasonable, and did not in any way clog or fetter the equity of redemption. See also *Santley v. Wilde* (c), the correctness of which was, however, questioned by Lord *Davey* in *Noakes & Co. Ltd. v. Rice*, and commented on in *Bradley v. Carritt* (d).

On the other hand, a stipulation that, in case the property is sold, the mortgagee shall receive a bonus or commission, has been held bad (d); as also has a stipulation in a mortgage payable by instalments making the entire debt (and not merely the balance) recover-

y) *Noakes & Co. Ltd. v. Rice*, [1902] A. C. 24.

(z) *Samuel v. Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323, and see also *Browne v. Ryan*, [1901] 2 Ir. R. 671; but cf. *London and Globe Finance Corporation v. Montgomery*, 18 T. L. R. 661.

(a) *John Brothers Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Bradley v. Carritt*, [1903] A. C. 253; but cf. *Reeve v. Lisle*, [1902] A. C. 461, and *Davies v. Chamberlain*, 26 T. L. R. 138.

(b) [1898] 2 Ch. 307.

(c) [1899] 2 Ch. 474.

(d) *Browne v. Ryan*, [1901] 2 Ir. R. 671, and see *Broad v. Selfe*, 9 Jur. (N.S.) 885, distinguished in *Mainland v. Upjohn*, 41 Ch. D. 126; *Barrett v. Hartley*, L. R. 2 Eq. 789.

able in case of default being made in payment of any instalment (*e*). Both cases were decided on the principle that any provision imposing on the mortgagor a liability to pay anything beyond principal interest and costs as the price of redemption is bad. Paragraph
433

Mortgagees have sometimes attempted to gain an undue advantage, by means of long leases from their mortgagors, at fixed rents. It was (or is said to have been), the opinion of Lord *Redesdale*, that such a transaction would not be allowed (*f*). But although he said (*g*) it was the general impression that a lease by the mortgagor to the mortgagee could not stand, the parties not being able to deal upon equal terms, he said also, that the person redeeming was to have the estate reconveyed free from any incumbrance by the mortgagee (which he seemed to think would apply, by reason of pressure, to a lease obtained from the mortgagor); and that the effect of the lease would be to leave the mortgagee an advantage to himself after payment of his principal, interest and costs. From this it seems evident, that Lord *Redesdale*, was speaking of such a lease as that upon the validity of which he was then deciding, viz., a lease for 999 years at a rent no higher than would be reserved under a common occupation lease, and which was in effect, as he said, a parting with the inheritance (*h*). He observed also upon the distinction between such a lease and a lease for twenty-one years at a fair value, or a term in the nature of an occupation lease. And in a somewhat earlier case (*i*), Lord *Redesdale* is reported to have said, that in the simple case of a mortgagor giving a lease to a mortgagee, there was perhaps no ground to impeach the lease; but that the court would look with great jealousy upon anything more, and that if the mortgagee took advantage of the distress of the mortgagor, or the latter made the lease in consideration of forbearance, it would be bad. Upon considering the whole tendency of Lord *Redesdale's* remarks, therefore, it can hardly be said that Lord *Manners* differed from him judicially (*k*) when he upheld a lease made by a mortgagor to a mortgagee, at a fair rent, for a period, at first of twenty-one years, and afterwards by renewal for a somewhat longer time; but with a proviso making it void upon payment of the mortgage money, the mortgagee afterwards offering upon payment to give up the lease.

In another case in Ireland, before Lord *St. Leonards*, a prior

(*e*) *Booth v. Salvation Army Building Association*, 14 T. L. R. 3.

(*f*) See *Morony v. O'Dea*, 1 Ba. & Be. 109.

(*g*) *Webb v. Rorke*, 2 Sch. & Lef. 661.

(*h*) See also the remarks of Lord ELDON and Lord REDESDALE in the like case of *Hickes v. Cooke*, 4 Dow, at p. 17.

(*i*) *Gubbins v. Creed*, 2 Sch. & Lef. 214.

(*k*) *Morony v. O'Dea*, 1 Ba & Be. 109. Lord MANNERS clearly thought he was differing from Lord REDESDALE; but perhaps he thought so from an imperfect knowledge of the case of *Webb v. Rorke*, which was not then reported.

Paragraphs
433—434

mortgagee, who had obtained leases subsequent to the *puisne* mortgage, was charged as a mortgagee in possession, and not as a lessee, upon the principle that the rights of the *puisne* mortgagee against the estate could not be affected after the date of his security, by any dealing between the mortgagor and the first mortgagee; but no question was raised as to the validity of the leases (*l*).

A lease by the mortgagor to the mortgagee will not be set aside when the value of the property has become changed by the lapse of many years since the making of the lease (*m*).

Securities
granted on
inadequate
grounds to
persons
holding
fiduciary
position.

434. Assurances for which there was an inadequate or no consideration, and between the parties to which such a fiduciary or other relation existed, that the maker of the security may be assumed to have been misled, unable to form a correct judgment, or under the influence of the person in whose favour it was made, are liable to be set aside by courts of equity, or to be treated only as securities for so much money as can be proved to have been advanced, with interest at a reasonable rate.

When, therefore, an inadequate consideration (which alone gives no title to relief (*n*)), is given to a person who is of weak intellect, or subject to the influence which arises out of the relation of parent and child, or guardian and ward, or other like pressure (even though the actual relation may be at an end (*o*)), in a transaction with the person under whose influence he is or is supposed to be, or who, by reason of a superior knowledge of the property or other circumstances, is likely to have an advantage over him, he is entitled (*p*), as against the grantee and against volunteers claiming under him, and all other persons who claim with notice of the equity or of the circumstances under which it arose (*q*), to be relieved from the consequences. And it is for the other party to show that the grantor had such professional advice, (though not necessarily from another solicitor than him who acted for the grantor (*r*)), as to enable him to exercise a proper judgment, and that he was not misled by artifice or contrivance; the existence of which any false recital or suggestion in the security will tend to show (*s*). On the other hand, in cases of

(*l*) *Gregg v. Arnott*, L. & G. t. Sugd. 246.

(*m*) *Hickes v. Cooke*, 4 Dow, at p. 17.

(*n*) *Harrison v. Guest*, 8 H. L. C. at p. 481.

(*o*) *Hylton v. Hylton*, 2 Ves. Sen. 547; and see *De Witte v. Addison*, 80 L. T. 207.

(*p*) *Maitland v. Irving*, 15 Sim. 437; *Maitland v. Backhouse*, 16 Sim. 58; *Archer v. Hudson*, 7 Beav. 551; *Kay v. Smith*, 7 H. L. C. 750; *Espey v. Lake*, 10 Hare 260; *Savery v. King*, 5 H. L. C. 627; *Longmate v. Ledger*, 2 Giff. 157; *Harrison v. Guest* *supra*; *Kempson v. Ashby*, L. R. 10 Ch. 15.

(*q*) *Bainbrigg v. Browne*, 18 Ch. D. 188; *De Witte v. Addison*, *supra*.

(*r*) *Id.*

(*s*) *Baker v. Bradley*, 7 De G. M. & G. 597.

undue influence depending, not on relationship, but on threats, the onus of proof lies on the plaintiff (*t*). Paragraphs
434—438

435. The same equity is applied to contracts entered into by heirs, or other persons concerning their future or reversionary interests; as to which the Court of Chancery has gone far beyond the original principle of protecting young and improvident persons, whose expectations make them liable to imposition (*u*). Inasmuch that, in case of an inadequate consideration, a mortgage will be reduced to a security for the actual advance, with interest at the rate usually allowed in such cases by the court, although the expectant heir with whom the transaction was made, was of full, and even of mature age, and was independently advised, and understood the nature of the bargain: and the onus of showing that it was reasonable and provident, is thrown upon the mortgagee, and not the contrary upon the mortgagor (*x*). Securities
granted
by expectant
heirs and
reversioners.

436. The principle does not apply to a settlement made by an expectant heir upon his wife and children, although it be alleged to have been obtained on their behalf by undue influence (*y*). Settlement
on wife and
children by
expectant
heir, good.

437. Where the transaction takes the form of a sale, the conveyance will be directed to stand as a security for the amount actually found due, with interest, and in ordinary cases with costs, on the footing of a mortgage (*z*); and as in case of a mortgage, the refusal of a tender of all that the person who dealt with the heir was entitled to receive, will be visited with an order that he shall pay the costs of the suit (*a*). A security (under the like circumstances) will be ordered to stand for the sums actually advanced to, or for the benefit of, the owner of the expectancy. But where the case is tainted with fraud and misrepresentation, and it is not shown that the money was applied for the plaintiff's benefit, the security may be set aside unconditionally (*b*). The defendant, however, will generally, so far as subsequent events will permit, be placed in the same position as if the transaction had not taken place (*c*). Where
sale inequit-
able, it will
be treated as
a mortgage.

438. A similar jurisdiction has been exercised by courts of law over debts secured by warrants of attorney to enter up judgment; Similar
course
pursued by

(*t*) *McClatchie v. Haslam*, 65 L. T. 691.

(*u*) See remarks of Lord HARDWICKE in *Walmesley v. Booth*, 2 Atk. 27. The interest of a tenant for life whose estate is subject to annuities and to the interest upon mortgages, is not a reversionary interest within the scope of this doctrine. *Webster v. Cook*, L. R. 2 Ch. 542.

(*x*) *Davis v. Duke of Marlborough*, 2 Swans. at p. 139; *Emmet v. Tottenham*, 10 Jur. (N.S.) 1090; *Bromley v. Smith*, 26 Beav. 644; *Re Slater's Trusts*, 11 Ch. D. 227.

(*y*) *Shafto v. Adams*, 4 Giff. 492.

(*z*) *Peacock v. Evans*, 16 Ves. 512; *Davis v. Duke of Marlborough*, 2 Swans. at p. 139, note; Sugd. V. & P.; 286, ed. 14.

(*a*) *Emmet v. Tottenham*, 11 L. T. (N.S.) 404; 12 L. T. (N.S.) 838.

(*b*) *Kay v. Smith*, 7 H. L. C. 750.

(*c*) *Savery v. King*, 5 H. L. C. 627.

Paragraphs
438—441

courts of law
in relation
to debts
secured by
warrant of
attorney for
larger sum.
Solicitors
taking
mortgages
from client.

execution upon which for an excessive sum, has been set aside or reduced to a just amount, to be fixed by an officer of the court or a jury (*d*).

439. Solicitors also take securities from their clients under the restraints which are applied by courts of equity in other cases, as a check upon the exercise of undue influence; the relation between solicitors and their clients being so easily abused to the advantage of the former, that they are not allowed to deal upon the same footing as other persons. And although during the continuance of the relation the lapse of time may be a matter for consideration, it is said that the same weight is not due to it, as when the relation does not subsist (*e*).

Hence, if a solicitor purchase, or obtain a benefit, from his client, the solicitor is bound to show that he has taken no advantage of his professional position, but has given every information and advice, and has protected the client's interests in the same manner as if he had dealt with a stranger; in default of proof whereof the deed will only stand as a security for the amount found to be due (*f*); and a gift or security for a gift pending the relation is absolutely void (*g*) (**954**).

Assignments
of subject of
suit to
solicitor.

440. An assignment of the subject-matter of a suit by the client to his solicitor, *pendente lite*, is good, both at law and in equity, where it is made by way of security, because it is likely to be beneficial to the client (*h*). But a sale of such an interest is void at law for champerty or maintenance (*i*); and in equity will stand only as a security for the money advanced (*k*).

Rules of
equity as to
securities
given by
client to
solicitor.

441. The rules of equity as to securities given by the client, require that the debt secured shall have been advanced, or shall otherwise be actually due; that the amount, if not ascertained at the time, shall be capable of being ascertained (the onus of the inquiry being on the solicitor), and that there be no unusual provisions by which the client may be injured or kept in the solicitor's hands. And if any greater advantage be given to the solicitor than the law would give him (such as interest on his costs) (*l*), then that the client should first have been informed of his rights.

Where no objection arises upon these grounds, the security will be valid; and even where the consideration is money due on an

(*d*) *Shaw v. Marquis of Worcester*, 6 Bing. 385, *per* TINDAL, C.J.

(*e*) *Per* TURNER, L.J., *Gresley v. Mousley*, 4 De G. & J. at p. 96.

(*f*) *Cane v. Allen*, 2 Dow, 289; *Gibson v. Jeyes*, 6 Ves. 266; *Higgins v. Joyce*, 2 Jo. & Lat. 282; *Savery v. King*, 5 H. L. C. 627; *Welles v. Middleton*, 1 Cox, 112; *Holman v. Loynes*, 18 Jur. 839; *Montesquieu v. Sandys*, 18 Ves. 302; *Tomson v. Judge*, 3 Drew. 306; and see *Gresley v. Mousley*, 1 Giff. 450.

(*g*) *Newman v. Payne*, 2 Ves. Jun. 199.

(*h*) *Anderson v. Radcliffe*, El. Bl. & El. 806; *affd.* 29 L. J. Q. B. 128; *Wood v. Downes*, 18 Ves. 120.

(*i*) *Simpson v. Lamb*, 7 El. & Bl. 84.

(*k*) *Wood v. Downes*, *supra*.

(*l*) *Lyddon v. Moss*, 5 Jur. (N.S.) 637.

account, if the account have been properly investigated and settled between the parties, the mortgage will not be disturbed, nor the solicitor restrained in the exercise of his remedies (*m*). Paragraph
441

Nor where the debt is *bonâ fide* will the security be invalid, because it was made under pressure from the solicitor, or included in a security for other money obtained to relieve the urgent necessities of the mortgagor (*n*). If the security be oppressive in form, as by an unreasonable postponement of the time for redemption, the mortgagor will have the same rights as if the common form of security had been used; and where there has been concealment or misrepresentation in obtaining or framing the security, the mortgage will be valid only for so much as on taking the accounts shall appear to be actually due (*o*). So where the power of sale omitted the usual conditions precedent to its exercise, *North, J.*, refused to allow a solicitor mortgagee to sell, even after interest was three months in arrears, the solicitor not having explained the omission to the client (*p*). The same rule is observed both as to legal and equitable securities for costs or advances, the amount of which has not been fixed, or where bills for the costs have not been delivered; and the amount due on such securities for costs will be ascertained by taxation (*q*). But where several years had elapsed after the relation of solicitor and client had ceased, and no fraud or special error being alleged, taxation had been offered, and the client had enjoyed a benefit under the security, the accounts were not opened, though no bills were delivered till after the date of the mortgage (*r*).

The client cannot set up in answer to a suit to foreclose a mortgage, or to an action on a note or other security which he has given for costs, the provision of the Solicitors Act, 6 & 7 Vict. c. 73, s. 37, which requires delivery of a bill a month before action brought; the statute being inapplicable to an action on the security (*s*).

Where a mortgagee being a solicitor for the mortgagor neglects his duty towards him (as by omitting to register the mortgage when it requires registration under a statute), he will not be allowed

(*m*) *Judd v. Ollard*, 5 Jur. (N.S.) 755; *Jones v. Roberts*, 9 Beav. 419; see *Nelson v. Booth*, 5 W. R. 722.

(*n*) *Johnson v. Fesenmeyer*, 25 Beav. 88; *Pearson v. Benson*, 28 Beav. 598; *Cheslyn v. Dalby*, 2 Y. & C. Ex. 170.

(*o*) *Cowdry v. Day*, 1 Giff. 316; *Dunston v. Paterson*, 11 Jur. 96; *Thomas v. Lloyd*, 3 Jur. (N.S.) 288.

(*p*) *Cradock v. Rogers*, 51 L. T. 191; aff. 1885, W. N. 134; *Cockburn v. Edwards*, 18 Ch. D. 449.

(*q*) *Newman v. Payne*, 2 Ves. Jun. 199; *Harrison v. Wiltshire*, 2 Jur. 679; *Sandon v. Hooper*, 14 L. J. Ch. 120; *Davies v. Parry*, 1 Giff. 174; *Bristow v. Warner*, 10 Ir. Eq. Rep. 246, as to equitable security notwithstanding *Exp., Bovill*, 2 Mont. & A. 382, n. See *Philby v. Hazle*, 29 L. J. C. P. 370. But see 33 & 34 Vict. c. 28, s. 4.

(*r*) *Blagrove v. Routh*, 8 De G. M. & G. 620. But it seems that something equivalent to affirmance is necessary, besides lapse of time; unless perhaps the bare acquiescence were for a very long period. (*Lyddon v. Moss*, 5 Jur. (N.S.) 637.)

(*s*) *Thomas v. Cross*, 10 Jur. (N.S.) 1163; *Jeffreys v. Evans*, 14 Mee. & W. 210.

Paragraphs
441—443

to avail himself of it, even though it be not avoided by the non-registration (t) (1197).

Security for
costs not yet
incurred.

442. The rule which made void securities for costs not yet incurred, has been abolished ; and a solicitor may take security for his future fees charges and disbursements to be ascertained by taxation or otherwise (u).

SECTION III.

Of Securities which are affected by the
Nature of the Consideration.

	PARAGRAPH
<i>Securities given for immoral consideration</i>	443
<i>Marriage brocage contracts</i>	444
<i>Securities given for procuring undue influence</i>	445
<i>Securities for sale of public offices</i>	446
<i>Securities for betting or gaming transactions.. .. .</i>	447
<i>Securities given in consideration of withdrawal of creditor's opposition in bankruptcy proceedings</i>	448
<i>Collateral securities where money lent on terms of receiving share of profits, etc</i>	449
<i>Securities given in consideration of withdrawal of Parliamentary opposi- tion.. .. .</i>	450
<i>Securities given by a felon by way of restitution</i>	451
<i>Security given in consideration of cesser of illegal acts</i>	452

Securities
given for
immoral
considera-
tion.

443. A security which is given for an immoral or illegal consideration, is void both at law and in equity subject to disqualification that the illegality of part of the consideration does not necessarily vitiate the security throughout, if the document consists of several distinct contracts and considerations, some legal and some illegal (v). But where they are not distinct, but dependent on each other, the whole will be bad (x).

The common example of this kind of security is where a mortgage or annuity bond or deed is given to a woman in consideration of illicit intercourse with the grantor or obligor. The instrument is void, both at law and in equity, where the consideration (whether performed or not, and though partly for value), is wholly or in part for future illicit intercourse, or for giving facilities for obtaining or carrying it on (y). Where the security is given as a consideration for past cohabitation, or during its continuance, either simply or in such a form as to induce the woman to put an end to rather than to continue the connection, it will be good, though the connection continue after the date of the security, unless

(t) *Patent Bread Machinery Co., re Exp. Valpy & Chaplin*, L. R. 7 Ch. 289.
(u) 33 & 34 Vict. c. 28 (The Attorneys and Solicitors Act, 1870), s. 16.
(v) *Sheehy v. Sheehy*, [1901] 1 Ir. R. 239.
(x) See *Moulis v. Owen*, [1907] 1 K. B. 746 at p. 753; *Browne v. Bailey*, 24 T. L. R. 644.
(y) *Gray v. Mathias*, 5 Ves. 286; *Bullmore v. Willyams*, 32 Beav. 574. *Phillips v. Probyn*, [1899] 1 Ch. 811. But conf. *Ayerst v. Jenkins*, L. R. 16 Eq. 275, where a settlement on the occasion of a marriage with a deceased wife's sister was held to be good on the ground that it was a gift, and not a mere contract.

it be shown that the continuance was the real consideration (z). Distinctions which appear to have been made in earlier cases, where the consideration was *præmium pudicitiae*, and where a party to the immoral contract came for relief (a), have been dropped or qualified; and the dictum (b), that although the latter could have no relief, his personal representative might, has been overruled (c). A party to the contract may now have discovery in aid of his defence against an action on an instrument, upon the face of which the illegal consideration does not appear, unless the discovery be sought from a participator who by giving it would be exposed to penalties (d). And he may have full relief in equity, unless his case be mixed up with complaints, contaminated with the original immoral purpose (e), or unless the illegal consideration is so apparent on the face of the document that it would be held void at law, independently of the statements in the pleadings (f). And a transaction which has been completed by a transfer of property, and which, being free from any appearance of illegal consideration, is valid at law, cannot be set aside like an obligation *in fieri* by the donor, on the mere ground of the illegality of his intention in making it (g).

Paragraphs
443—444

444. Securities given as a reward for procurement of marriage (commonly called *marriage brocage*) with a particular person, are also void, as contrary to that freedom of choice in marriage which is encouraged by public policy. Such securities may be ordered to be delivered up, and sums already paid under them to be returned (h); and it is said that if they are at all capable of confirmation, it can only be done with a particular knowledge of the circumstances, and not by a general release of the remedy against them (i). This rule, however, does not necessarily invalidate an agreement made by both the persons about to marry, to pay to another a sum of money upon their marriage, because the circumstances negative the presumption that any imposition has been practised against either of them (k).

Marriage
brocage
contracts.

(z) *Gray v. Mathias*, *supra*; *Hill v. Spencer*, Ambler, 641; *Dillon v. Jones*, cited 5 Ves. 291; *Gibson v. Dickie*, 3 Mau. & S. 463; *Hall v. Palmer*, 3 Hare, 532.

(a) See *Priest v. Parrot*, 2 Ves. Sen. 160; *Bainham v. Manning*, 2 Vern. 241; *Matthew v. Hanbury*, 2 Vern. 187.

(b) *Id.* 2 Vern. at p. 188.

(c) *Per* Lord SELBORNE, *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

(d) *Franco v. Bolton*, 3 Ves. Jun. 368; *Benyon v. Nettlefold*, 3 Mac. & G. 94. See *Ayerst v. Jenkins*, *supra*.

(e) *Batty v. Chester*, 5 Beav. 103.

(f) *Smyth v. Griffin*, 13 Sim. 245.

(g) *Ayerst v. Jenkins*, *supra*.

(h) *Drury v. Hooke*, 1 Vern. 411; *Stribblehill v. Brett*, 2 Vern. 445; *Smith v. Bruning*, 2 Vern. 392; see *Smith v. Aykwell*, 3 Atk. 566.

(i) *Shirley v. Martin*, 3 P. Wms. 74, n. *Per* Lord HARDWICKE, *Cole v. Gibson*, 1 Ves. Sen. at p. 506.

(k) *Per* Lord HARDWICKE, *Cole v. Gibson*, 1 Ves. Sen. at p. 507.

Paragraphs
445—447

Securities
given for
procuring
undue
influence.

445. The same policy invalidates securities made as a reward for the use of influence over any person, to induce him to dispose of his estate for the benefit of the maker of the security. But in this, as in some cases of marriage brokerage securities, it may be that the plaintiff will not have costs, because he is *particeps criminis* (l).

Securities for
sale of public
offices.

446. Upon the same principle of public policy, securities given for obtaining, or for procuring the sale of, a public office of trust, are void, whether the office be or be not one the sale of which is forbidden by statute (m) (**453**).

Securities for
betting or
gaming
transactions.

447. By the statute 5 & 6 Will. 4, c. 41, it was in effect enacted that every note, bill, or mortgage, the whole or part of the consideration for which was money or other valuables won by gaming, or playing at or betting on any games, or for the repayment of money knowingly lent for such gaming or betting, or at the time or place of such play, to any person gaming or betting, should be deemed to have been made for an illegal consideration. Under certain Acts (n), partially repealed by that Act, not only such notes and mortgages, but also *bonds, judgments, and other securities* for a like purpose had been made *void*; and it has been intimated that although not expressly referred to in the Act of Will. 4, they are impliedly covered by it (o). The object and result of 5 & 6 Will. 4, c. 41, was to safeguard *bonâ fide* purchasers for value of such notes and mortgages, without notice of the illegal consideration, such purchasers, however innocent, being under the former Acts deprived of the benefit of such notes and mortgages. The Act, in order to preserve the invalidity of such documents as between the original parties, provided, that if any person should pay to an indorsee, holder, or assignee of such note, bill, or mortgage, the whole or part of the amount thereby secured, the money was to be taken to have been paid on account of the person to whom the security was given upon such illegal consideration, and to be a debt due and recoverable by action from him, to the person who should have paid the money. By a subsequent act, (8 & 9 Vict. c. 109), all contracts or agreements by parol or in writing by way of gaming or wagering were declared void. And it was enacted that no suit should be brought in any court of law or equity to recover any money or valuable securities alleged to be won upon a wager, or which shall

(l) *Debenham v. Ox.* 1 Ves. Sen. 275, distinguished in *Higgins v. Hill*, 56 L. T. 426.

(m) *Law v. Law*, 3 P. Wms. 391; *Stackpole v. Earle*, 2 Wils. 133.

(n) 16 Car. 2, c. 7, s. 3; 9 Anne c. 14 s. 1.

(o) *Hawker v. Hallewell*, 25 L. J. Ch. 558. Whether, however, a bond or judgment (not being mentioned in the Act of Will. 4) is illegal now that the statutes of Car. 2 and Anne are repealed, *Quære*; see *per* Sir R. PALMER, *arguendo* *Bubb v. Yelverton*, L. R. 9 Eq. at p. 472.

have been deposited to abide the event of a wager save as to subscriptions to prizes for the winner of any lawful game (*p*). The effect of this provision was only to make a contract void which is affected by it, but not to make it illegal; so that money paid for one who lost a wager, at his request, was recoverable (*q*); but this is prohibited by a recent statute (*r*).

Paragraphs
447—448

The remedy under these Acts, is not confined to courts of law (*s*), and accordingly courts of equity have in several cases given relief, by ordering the delivery up of securities, as well where they were given directly for the gambling debt as where they were given abroad in exchange for the original gaming securities, and where they were given after the completion of the first transaction (*t*).

If a loan be placed by the lender in the hands of the borrower, as the lawful owner of it, to dispose of as he pleases, a security for its repayment will be good, although the lender may have expected to be paid out of it the amount of bets won by him from the borrower. But if it were lent under an agreement that the bets should be paid out of it, the security will be bad (*u*). It has been held that a bond to secure moneys agreed to be paid to avoid being warned off the turf, and other liabilities arising from the non-payment of racing debts, is good (*x*).

448. Upon the general principle that private arrangements between debtors and particular creditors relating to their debts, are fraudulent as against the general body of creditors, courts of law and equity have always considered as void securities the consideration for which is the withdrawal of the creditor's opposition in the bankruptcy of the debtor (*y*); or given for a debt omitted from the schedule and secretly held in suspense until the discharge of the bankrupt (*z*); or taken privately for the balance of a debt for which the creditor appears to accept a composition, although no creditor be actually induced by the fraud to come in (*a*). And the

Securities given in consideration of withdrawal of creditor's opposition in bankruptcy proceedings.

(*p*) Sections 15, 18.

(*q*) *Jessopp v. Lutwyche*, 10 Ex. 614; *Rosewarne v. Billing*, 15 C. B. (N.S.) 316; *Fitch v. Jones*, 5 El. & Bl. 238; *Beeston v. Beeston*, 1 Ex. D. 13. For the distinction where the transaction is illegal, and subject to penalties, see *Fisher v. Bridges*, 3 El. & Bl. 642.

(*r*) 55 Vict. c. 9.

(*s*) 18 Geo. 2, c. 34.

(*t*) *Newman v. Franco*, 2 Anst. 519; *Andrews v. Berry*, 3 Anst. 634; *Rawden v. Shadwell*, Amb. 269; *Wynne v. Callandar*, 1 Russ. 293; *Parker v. Alcock*, Younge, 361. As to the recovery of securities despatched with brokers to secure "differences" see *Universal Stock Exchange Co., Ltd. v. Strachan*, [1896] A. C. 166.

(*u*) *Fox v. Hill*, 4 H. & N. 359.

(*x*) *Bubb v. Yelverton*, L. R. 9 Eq. 471; and see, as to the legality of such a debt in other respects, *Johnson v. Lansley*, 12 C. B. 468.

(*y*) *Jackson v. Davison*, 4 B. & Ald. 691; *Rogers v. Kingston*, 2 Bing. 441.

(*z*) *Tabram v. Freeman*, 4 Tyr. 180.

(*a*) *Middleton v. Lord Onslow*, 1 P. Wms. 768; *Cockshott v. Bennett*, 2 T. R. 763; *Faucett v. Gee*, 3 Anst. 910; *Jackman v. Mitchell*, 13 Ves. 581; *Pendlebury v. Walker*, 4 Y. & Coll. 424.

Paragraphs amount received in respect of such security has been allowed to
448—452 be recovered by the trustee of the bankrupt debtor (*b*).

Collateral
securities
where money
lent on terms
of receiving
share of
profits, etc.

449. Although the lender of the money to a trader under a contract that he shall receive a rate of interest varying with the profits, or a share of profits, cannot, by ss. 2 and 3 of the Partnership Act, 1890, recover his principal or the profits or interest, on the bankruptcy of the trader until the other creditors for valuable consideration have been paid, the Act does not deprive the mortgagee of his right to the property mortgaged to him ; and the trustee in bankruptcy can only get possession of it on the usual terms of redemption (*c*).

Securities
given in
consideration
of withdrawal
of parliamentary
opposition.
Securities
given by a
felon by way
of restitution.

450. Securities for the payment of money to persons who would be injured by the passing of a private bill through Parliament, in consideration of the withdrawal of their opposition to the bill, are not illegal (*d*).

451. A debt arises by robbery, from the robber to the person robbed ; the civil remedy of the latter is suspended until the conviction of the offender, but the debt is a good consideration for a security made by him before that event for the sum stolen (*e*). And though the giving security to a person who has honoured a bill to which his name was forged, in order to conceal the crime, is against public policy, the security cannot be impeached by the debtor, who is in *pari delicto* ; or by his trustee in bankruptcy, who has no better right (*f*).

Security
given in
consideration
of cesser of
illegal acts.

452. A security given in consideration that the grantee shall cease to do an illegal act, is not on that account illegal ; but as there is no valuable consideration, the transaction is merely voluntary (*g*).

SECTION IV.

Of Securities which are Affected by the Nature of the Security.

SUB-SECTION (1).—Of Securities upon the Profits of Offices.

	PARAGRAPH
<i>Sale of public offices</i>	453
<i>Securities on pensions, pay, etc., of officers of the Crown</i>	454
<i>Securities on emoluments of clerk of peace and judges</i>	455
<i>Securities upon fellowships, etc.</i>	456
<i>Securities on allowances made to committees of lunatics</i>	457

(*b*) *Alsager v. Spalding*, 6 Scott. 204.
(*c*) *Exp. Sheil, Re Lonergan*, 4 Ch. D. 789 ; *Frowde v. Williams*, 56 L. J. Q. B. 62 ; *Badeley v. Consolidated Bank*, 38 Ch. D. 238.
(*d*) *Vauxhall Bridge Co. v. Earl Spencer*, Jac. 64 ; see *Lord Petre v. Eastern Counties Rail. Co.*, 1 Ry. Cas. 462.
(*e*) *Chowne v. Baylis*, 31 Beav. 351 ; see *Dudley, etc., Banking Co. v. Spittle*, 1 Johns. & H. 14.
(*f*) *Re Mapleback, Exp. Caldecott*, 4 Ch. D. 150.
(*g*) *Eddison v. Rothery*, 10 Jur. (N.S.) 943.

SUB-SECTION (2).—*Of Securities upon Ecclesiastical Benefices.* Paragraphs 453—454

PARAGRAPH

Securities on advowsons ecclesiastical salaries, etc. 458SUB-SECTION (3).—*Of Securities upon Property forbidden to be Incumbered.**Property cannot be given with restraint on alienation except in the case of a married woman, and even then the court can release restraint* .. 459*But property may be settled on a man until he attempts to alienate or incumber, and then over* 460*How far such settlements are valid* 461*A mere offer to incumber is not an attempt* 462*True rule is to ascertain whether event has occurred on which gift over is to take effect* 463*Effect of bankruptcy where gift over on alienation by any act or default or by operation of law* 464*Prohibition against incumbering income does not apply to past income* .. 465SUB-SECTION (1).—*Of Securities upon the Profits of Offices.*

453. The sale of public offices is *malum in se*, independently of the statute law (*h*). But by a statute of Edward 6, all assurances of any office concerning the administration or execution of justice, or any service of trust, or the receipt, control or payment of the king's revenues or customs, or the custody of fortresses, or the clerkship in any court of record where justice is to be administered, were declared to be void as against the person making the assurance, with an exception in favour of offices of inheritance, and of the keeping of parks or forests (*i*). This Act (preserving the exceptions) was afterwards extended (*k*) to Scotland and Ireland, and to all offices in the gift of the Crown, civil, naval, and military commissions, and employments under the control of the different officers of state.

454. Other statutes (*l*) declare to be void, all assignments of pensions, allowances and relief to disabled, invalid or discharged soldiers, and of any pay, pension, allowance, or relief, payable to any officer or person who has served in the king's forces, or any widow of any such officer, or any person receiving any allowance or pension on the compassionate list, or any pension, allowance, or relief in respect of any military service.

Assignments or contracts of or in relation to any naval pension, allowance or half-pay, by an officer, seaman or marine, officer's widow, or holder of allowance from the compassionate fund; or of any pay, wages, bounty, money grants, or other allowances in

(*h*) *Stackpole v. Earle*, 2 Wils. 133.(*i*) 5 & 6 Edw. 6, c. 16. See 6 Geo. 4, c. 105, and St. L. Rev. Act, 1863.(*k*) 49 Geo. 3, c. 126; St. L. Rev. Act, 1872, (No. 2.)(*l*) 46 Geo 3, c. 69, s. 7; 47 Geo. 3, c. 25, s. 4; St. L. Rev. Act, 1872, (No. 2.) See *Lloyd v. Cheetham*, 3 Giff. 171.

Paragraph
454

the nature thereof, for services in the naval or marine forces, to a subordinate officer, seaman or marine, shall be void (*m*).

The accruing full (*n*) or half-pay of military or naval officers in the service of the Crown (844) cannot, for reasons of public policy, be assigned by law (*o*); because the alienation of the stipends of officers and others in the public service, who receive allowances upon the terms that they are to remain liable to serve the Crown when required, would prevent their prompt attention when they are called upon to fulfil their duties (*p*). And an allowance to a civil servant of the Crown on the abolition of his office under 4 & 5 Will. 4, c. 24, is in the same position, the recipient being still liable under the Act to serve the Crown, and being in fact still in its service though without special duty (*q*). But pensions given entirely as compensation for past services are assignable (*r*). And pensions to an officer of the late Indian navy (*s*), or of the forces of the East India Company before they were transferred to the Crown (*t*), or to a *quasi* public officer in consequence of an alteration in the law which has deprived him of his emoluments (*u*), might also be assigned, there being no statute to the contrary, and no duty being implied with which the assignment would interfere. And since the transfer to the Crown of the forces of the East India Company (*x*), an assignment of a pension granted to an officer of the company's service has been supported, on the ground that not having been granted by the Crown, or taken from moneys under the control of Parliament, the assignment was not within the mischief of the statutes. But the observations of Lord Westbury, C., on the hearing of the appeal, and the compromise of the case by his desire, make it doubtful whether the decision would have been supported (*y*). Prize money is not within the prohibition, and an assignment even of the captor's inchoate or possible interest

(*m*) 28 & 29 Vict. c. 73, ss. 4, 5.

(*n*) *Barwick v. Reade*, 1 H. Bl. 627.

(*o*) *Flarty v. Odium*, 3 T. R. 681. Approved by Lord ALVANLEY, in *Arbuckle v. Cowtan*, 3 Bos. & P. 328. And as to pledges or sales of officers' commissions and half-pay, see *Collyer v. Fallon*, Turn. & Russ. 459; *L'Estrange v. L'Estrange*, 13 Beav. 281; *Somerset v. Cox*, 33 Beav. 634; *Price v. Lovett*, 15 Jur. 786.

(*p*) *Grenfell v. Dean and Canons, etc., of Windsor*, 2 Beav. at p. 549; *Stone v. Lidderdale*, 2 Anst. 533; *McCarthy v. Gould*, 1 Ba. & Be. 389.

(*q*) *Wells v. Foster*, 8 Mee. & W. 149.

(*r*) *Id.*, per PARKE, B.

(*s*) *Dent v. Dent*, L. R. 1 P. & M. 366. (Distinguished in *Lucas v. Harris* 18 Q. B. D. 127.) See *James v. Ellis*, 19 W. R. 319.

(*t*) *Heald v. Hay*, 3 Giff. 467.

(*u*) *Spooner v. Payne*, 18 L. J. Ex. 401.

(*x*) 21 & 22 Vict. c. 106 (1858).

(*y*) *Carew v. Cooper*, 4 Giff. 619. A retiring military pension granted by the company has been held not to pass to the assignees on the bankruptcy of the pensioner, on the ground that not being granted under the common seal of the company they could not be made liable in a court of law for payment of it. (*Gibson v. East India Co.*, 5 Bing. N. C. 262.)

in it before grant by the Crown, will be supported in equity (z). Paragraphs
454—457
An assignment of a revocable pension, granted as compensation for the loss of a civil office, has been enforced without prejudice to the rights of the Treasury, or of the heads of the department in which the office was held (a). It has been held otherwise as to a pension granted for the support of a dignity, and as a reward for great services: although in the case which raised the question, the receipts of the grantee and his successors had been expressly declared to be the proper discharges for the pension (b).

455. The emoluments of a clerk of the peace cannot be assigned (c) Securities on
emoluments
of clerk of
peace and
judges.
But it was held, that the assignment by a judge of one of the supreme courts in India, of the money directed to be paid to his representative by the statute 6 Geo. 4, c. 85, if he should die in, and after six months' possession of office, was valid; and that not being payable during the life of the judge, it was not an assignment of the salary within the statutes of Edw. 6 and 49 Geo. 3 (d).

456. The validity of securities upon the profits arising from the fellowships of colleges, has been the subject of conflicting decisions upon applications to enforce them by the appointment of a receiver. Upon one occasion (e) a motion for a receiver was dismissed with costs, but it was afterwards held (f) that there might be a receiver both of past and future appropriations, in respect of the profits of a fellowship of the same college, the duties being so slight that no question of public policy could interfere with the validity of the assignment. And so it has been held (g) as to the canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence and of attendance on divine service; the performance of which duty by the canon is of no benefit to the public. But a mortgage of a canonry with the lands belonging to it cannot be enforced by ejectment, the canonry being only the name of an ecclesiastical office, and the owner of it having no property in the lands (h).

457. A committee or other person to whom an allowance is made in lunacy, cannot mortgage either the allowance itself or the arrears of it, although it be fixed partly with a view to his own Securities on
allowances
made to
committees
of lunatics.

(z) *Alexander v. Duke of Wellington*, 2 Russ. & Myl. 35.

(a) *Tunstall v. Boothby*, 10 Sim. 542; *Spencer v. Cox*, 2 Anst. 535, n.

(b) *Davis v. Duke of Marlborough*, 1 Swans. 74.

(c) *Palmer v. Bate*, 6 Moore, 28.

(d) *Arbuthnot v. Norton*, 5 Moo. P. C. 219. As to civil superannuation allowances, see *Innes v. East India Co.*, 17 C. B. 351; *Exp. Hawker, Re Keely*, L. R. 7 Ch. 214. Retiring allowance to civil servant of East India Company does not pass to trustee in bankruptcy, and cannot be taken in execution.

(e) *Berkeley v. King's College, Cambridge*, 10 Beav. 602.

(f) *Feistel v. King's College, Cambridge*, 10 Beav. 491.

(g) *Grenfell v. Dean and Canons of Windsor*, 2 Beav. 544.

(h) *Doe d. Butcher v. Musgrave*, 1 Man. & Gr. 625.

Paragraphs
457—459

benefit; for it is still made to him for a definite purpose and in a fiduciary character, and the court always has power to revoke or deal with it *ab initio*, so far as it has not been actually paid (*i*).

SUB-SECTION (2).—*Of Securities upon Ecclesiastical Benefices.*

458. Although a mortgage of an advowson is still permitted by s. 1 (7) of the Benefices Act, 1898 (*k*) (at all events where more than 12 months have elapsed since the last institution or admission to the benefice, and subject to registration in the diocesan registry within one month from its date or such further time as the bishop may think fit). Yet mortgages of or charges upon the *profits of the incumbent* are forbidden (*l*) except for certain purposes specified in Gilbert's Acts and the other Acts mentioned, *supra* (350–358). The prohibition extends to a mortgage of pew rents of a district church under the Church Building Acts, although they are payable to the Churchwardens (*m*); but not to an annuity granted to a retiring incumbent under the Union of Benefices Act, 1860 (*n*), although it does extend to a pension granted to a retiring clerk under the Incumbents Resignation Act, 1871 (*o*).

SUB-SECTION (3).—*Securities upon Property which is forbidden to be Incumbered.*

Property cannot be given with restraint on alienation except in the case of a married woman, and even the

459. Property cannot be given to a man beneficially, with a proviso that he shall not have the power of alienating or incumbering it. Such a proviso would be repugnant to the gift and void (*p*). There is, however, an exception to this rule in the case of married women upon whom property is settled for their separate use in equity (306), and who may, by the same instrument, be restrained from alienating or charging it *during coverture* (*q*). The restraint, however, is inoperative during spinsterhood and widowhood (*r*),

(*i*) *Re Weld*, 20 Ch. D. 451.

(*k*) 61 & 62 Vict. c. 48. But such a mortgage (a precedent of which will be found in Vol. 8 of the Encyclopædia of Forms, etc., p. 673), is not a satisfactory security. The only ways of enforcing it are sale or foreclosure, and a sale cannot be made by public auction unless the mortgage also comprises a manor or an estate in land of not less than 100 acres in the same or an adjoining parish (Benefices Act, 1898, sect. 1 (2)). The mortgagee cannot present to the living as that would be a profit which it would be impossible to account for (*Amhurst v. Dawling*, 2 Vern. 401; *Gubbons v. Creed*, 2 Sch. & Lef. 214, 218; *Welch v. Bishop of Peterborough*, 15 Q. B. D. 432). Moreover, owing to the unfortunate phraseology of sub-sections (3) (c) and (6) of section 1 of the above Act, doubts have arisen in some minds (although the Editor does not share in them) whether such a security is free from danger in relation to interest on the loan.

(*l*) 13th Eliz. c. 20, repealed by 43 Geo. 3, c. 84, but revived on the repeal of the latter statute by 57 Geo. 3, c. 99, and see 1 & 2 Vict. c. 106, sec. 1, and 37 & 38 Vict. c. 96, Sched.

(*m*) *Exp. Arrowsmith, Re Levenson*, 8 Ch. D. 96.

(*n*) *McBean v. Deane*, 30 Ch. D. 520.

(*o*) 34 & 35 Vict. c. 44, sect. 10; *Gathercole v. Smith*, 17 Ch. D. 1.

(*p*) *Brandon v. Robinson*, 18 Ves. 429.

(*q*) *Tullett v. Armstrong*, 9 L. J. (N.S.) Ch. 41.

(*r*) *Ib.*

and, moreover, can now be dispensed with by the court, which may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property (s). Where, therefore, a woman is restrained from anticipation, she can nevertheless make a good mortgage so long as she has no husband in existence, but during *coverture* she is incapable of making one unless by the sanction of the court. The restraint applies not only to one, but to every *coverture*, unless it be restricted to one (t).

Paragraphs
459—461

court can
release
restraint.

460. But although a man, or an unmarried woman, cannot be restrained from alienating property which is his or hers, property may be settled to the use of or in trust for a person *until* he attempts to alienate or incumber it, or becomes bankrupt or the like, and then to the use of or in trust for some other person or class of persons (u). In other words, a security may be ineffectual by reason of some limitation or contract, under which the estate or interest of the maker, in the subject of it, is made to cease upon his creating, or attempting to create, an incumbrance thereon.

But property
may be
settled on a
man until he
attempts to
alienate or
incumber, and
then over.

461. At first sight it would seem that in the case of *Re Detmold*, *Detmold v. Detmold* (x), North, J., decided that notwithstanding 13 Eliz. c. 5, a person may lawfully settle his own property on himself until attempted alienation or until involuntary alienation, by any other means than bankruptcy (*ex. gr.* seizure by a judgment creditor), and may thereby effectually cheat his mortgagee or judgment creditor (x). With unfeigned respect for the learned judge who decided this case, and for the authorities in which his judgment was founded, it seems difficult to understand how that could be so, and in a more recent case before the Court of Appeal it was pointed (y) out by *Cozens-Hardy*, L.J., that the sole point (raised by originating summons in the matter of the trust) in *Re Detmold* was as to the inherent validity of a gift over on alienation by the husband, and that the larger question as to whether it was void against the husband's creditors under the statute of Elizabeth was not raised or discussed. Anyhow, where a man settles his own property on himself until *bankruptcy*, and then over, it has been held

How far such
settlements
are valid.

(s) Conveyancing and Law of Property Act, 1881, s. 39. As to when this power will be exercised by the court, see *Re Little, Harrison v. Harrison*, 40 Ch. D. 418; *Re Warren's Settlement*, 52 L. J. Ch. 928; *Re Jordan, Kino v. Picard*, 55 L. J. Ch. 330; *Re C.'s Settlement*, 56 L. J. Ch. 556; *Re Currey, Gibson v. Way*, 56 L. J. Ch. 387; *Re Milner's Settlement*, [1891] 3 Ch. 547; *Re Pollard's Settlement*, [1896] 1 Ch. 901; affirmed [1896] 2 Ch. 552.

(t) *Hawkes v. Hubback*, L. R. 11 Eq. 5; *Scarborough v. Borman*, 4 Myl. & Cr. 377; *Re Gaffee*, 1 Mac. & G. 541.

(u) *Billson v. Crofts*, L. R. 15 Eq. 314; *Re Aylwin's Trusts*, L. R. 16 Eq. 585, and cases there cited, and *Re Detmold, Detmold v. Detmold*, 40 Ch. D. 585.

(x) *Re Detmold, Detmold v. Detmold*, 40 Ch. D. 585.

(y) *Re Holland, Gregg v. Holland*, [1902] 2 Ch. at p. 367.

Paragraphs
461—463

to show so fraudulent an intent as to be void under 13 Eliz. c. 5 (z).

A mere offer
to incumber
is not an
attempt.

462. Where the prohibition extends to an attempt to incumber, a forfeiture is only created by an act which, but for the prohibition, would have the effect of an assignment or security upon the property. An offer to give a security will not create a forfeiture, much less the expression of a desire to create an incumbrance, and the taking advice as to the power to do so (a).

True rule is
to ascertain
whether
event has
occurred on
which gift
over is to
take effect.

463. In construing these provisions, the question is, whether the event has occurred upon which it was provided that the property should go over. Where the terms of the prohibition are contained in a covenant by a lessee, a covenant not to transfer, assign, or otherwise part with the demised property or the lease, is not broken (b) by a deposit of the lease by way of equitable mortgage; the object of such a covenant being only to restrain the alienation of the legal interest, to the prejudice of the lessor; and the deposit may obtain the usual order for sale in bankruptcy. So the contracting and non-payment of debts, and the giving, as collateral security, a warrant of attorney or *cognovit* under which judgment is entered up, and execution issued, is no breach of the covenant not to encumber (c), for the reason already noticed (491), that such a security (when given *bonâ fide* and not for the purpose of evading a restriction upon alienation), does not differ in character from an adverse judgment; and because *non constat* that the property will be taken under that judgment. The same result follows also where the covenant does not extend to the doing of any act whereby the property may be incumbered, because the giving such security does not amount to a direct charge of incumbrance. But the filing a declaration of insolvency is a breach of the covenant (d); and an equitable mortgage by deposit, coupled with a warrant of attorney under which judgment was entered up, and execution issued, has been held (e) to determine the interest of a devisee under a conditional limitation, by which the estate was to go over if the devisee should dispose of or sell the property; because these being voluntary acts, which give the creditor a specific lien, and a right to sale in equity, and show a purpose to part with the possession, the judgment and execution had not the adverse

(z) *Higginbottom v. Holme*, 19 Ves. 88; *Re Pearson, Exp. Stephens*, 3 Ch. D. 807; but distinguish *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

(a) *Graham v. Lee*, 23 Beav. 388; *Jones v. Wyse*, 2 Keen, 285.

(b) *Doe d. Pitt v. Hogg* 1 Car. & P. 160; *Exp. Drake*, 1 Mont. D. & De G. 539; and see *Doe d. Goodbehere v. Bevan*, 3 Mau. & S. 353.

(c) *Doe d. Mitchinson v. Carter*, 8 T. R. 57, 300; *Croft v. Lumley*, 5 El. & Bl. 648, 682; *Avison v. Holmes*, 1 Johns. & H. 530; *Seymour v. Lucas*, 1 Dr. & Sm. 177.

(d) *Hill v. Cowdery*, 1 H. & N. 360.

(e) *Doe d. Norfolk v. Hawke*, 2 East, 480.

character which is usually imputed to voluntary judgments. And a charging order under 1 & 2 Vict. c. 110, s. 14, will determine a life interest, which is made determinable on the execution or suffering of an act by which it should be incumbered at law or in equity (*f*).

Paragraphs
463—465

464. A petition for adjudication in bankruptcy, causes a *primâ facie* alienation within the words “by any act or default or by operation of law.” But the forfeiture does not take effect if the bankruptcy be annulled, and during the continuance of the bankruptcy there has been no income which could have been received by the bankrupt or his trustee in bankruptcy (*g*); otherwise, if it be annulled upon the terms that the past dividends shall be paid to the assignee (*h*). And so a security made by a remainderman, and paid-off during the life of a tenant for life, will not create a forfeiture which is to operate if the donee should, during the life of the tenant for life, do any act which would vest the subject of the gift in any other person (*i*). A forfeiture on bankruptcy, although coupled, in the will which contains it, with words of futurity, applies to a bankruptcy during the life of a testator (*k*).

Effect of
bankruptcy
where gift
over on
alienation by
any act or
default or
by operation
of law.

465. A prohibition against incumbering the income of property, will not invalidate a charge upon such income as has already become due at the date of the security (*l*).

Prohibition
against
incumbering
income does
not apply to
past income.

(*f*) *Montefiore v. Behrens*, L. R. 1 Eq. 171; *Roffey v. Bent*, L. R. 3 Eq. 759.

(*g*) *White v. Chitty*, L. R. 1 Eq. 372; *Lloyd v. Lloyd*, L. R. 2 Eq. 722; *Ancona v. Waddell*, 10 Ch. D. 157. See *Hill v. Cowdery*, *supra*; as explained and distinguished in *Robertson v. Richardson*, 30 Ch. D. 623.

(*h*) *Re Parnham's Trusts*, L. R. 13 Eq. 413.

(*i*) *Samuel v. Samuel*, 12 Ch. D. 152.

(*k*) *White v. Chitty*, *supra*; *Trappes v. Meredith*, L. R. 7 Ch. 248, following *Manning v. Chambers*, 1 De G. & Sm. 282; *Seymour v. Lucas*, 1 Dr. & Sm. 177. *Metcalf v. Metcalfe* [1891] 3 Ch. 1, but dist; *West v. Williams*, [1899] 1 Ch. 132. For other cases in which forfeiture may arise under alienation clauses, in cases not directly within the scope of this work, see *Crosbie v. Tooke*, 1 Myl. & K. 431; and cases cited in note to *Avison v. Holmes*, 1 Johns. & H. at p. 540; *Wadham v. Marlowe*, 8 East, 314, n.; *Baily v. De Crespigny*, L. R. 4 Q. B. 183; *Slipper v. Tottenham, etc. Rail. Co.*, L. R. 4 Eq. 112.

(*l*) *Re Stulz's Will*, 4 De G. M. & G. 404; *Hood-Barrs v. Heriot*, [1896] A. C. 174.

PART III.

OF LIENS.

CHAPTER	PARAGRAPH
I.—OF NON-POSSESSORY LIENS:	
SECTION I.—Of Judicial Liens	466—503
„ II.—Of Equitable Liens	504—532
II.—OF POSSESSORY LIENS:	
SECTION I.—Of the nature and divisions of pos- sessory liens	583—595
„ II.—Of general liens	596—602
„ III.—Of the particular debts for which possessory liens may be claimed ..	603—673

CHAPTER I.

Of Non-possessory Liens.

	PARAGRAPH
Section I.—Of Judicial Liens	467—503
SUB-SECT. (1).—JUDGMENT DEBTS	468—473
„ (2).—ORDERS FOR PAYMENT OF MONEY	474—483
„ (3).—CHARGING ORDERS	484—490
„ (4).—VOLUNTARY JUDGMENTS	491—500
„ (5).—CROWN DEBTS, ETC.	501—502 ^A
„ (6).—LITES PENDENTES	503
II.—Of Equitable Liens	504—582
SUB-SECT. (1).—THE LIEN UPON LAND FOR PURCHASE	
MONEY	505—511
„ (2).—PARTNERSHIP LIENS	512—519
„ (3).—LIENS FOR THE EXPENDITURE UPON THE	
PROPERTY OF ANOTHER, INCLUDING	
SALVAGE LIENS AND LIENS ON WEST	
INDIA ESTATES	520—530
„ (4).—LIENS OF TRUSTEES FOR COSTS, CHARGES,	
AND EXPENSES	531—538
„ (5).—LIENS IN CASES OF MISAPPROPRIATION AND	
WASTE	539—540
„ (6).—LIEN OF SOLICITORS ON THE FRUITS OF	
JUDGMENT APART FROM STATUTE	541—552
„ (7).—SOLICITORS, STATUTORY CHARGE ON PRO-	
PERTY RECOVERED OR PRESERVED	553—566
„ (8).—MARITIME LIENS	567—582

SECTION I.

Of Judicial Liens.

<i>Nature and division of liens</i>	466
<i>Definition of judicial lien</i>	467

SUB-SECTION (1).—*Judgment Debts.*

<i>Judgment debts now charge lands only where actually delivered in execution</i>	468
<i>Judgment creditors can now obtain sale of the land</i>	469
<i>As against bonâ fide purchasers, proceedings by way of execution against</i>	
<i>lands must now be registered</i>	470
<i>Removal of judgments from inferior courts</i>	471
<i>Scotch and Irish judgments may now be made to affect English lands and</i>	
<i>vice versâ</i>	472
<i>Irish judgment Acts</i>	473

Paragraph
466

SUB-SECTION (2).—*Orders for Payment of Money.*

	PARAGRAPH
<i>Orders for payment may now be enforced like judgments</i>	474
<i>The order must be final and specific</i>	475
<i>Orders for payment into court</i>	476
<i>Payment of money ordered by award</i>	477
<i>Act inapplicable where creditor has to do something further</i>	478
<i>Reviving abated suit after order for payment of costs</i>	479
<i>Order for payment of solicitor's bill</i>	480
<i>Orders in lunacy</i>	481
<i>Judgments on contingent debts</i>	482
<i>Order must be for the payment to the creditor himself</i>	483

SUB-SECTION (3).—*Charging Orders.*

<i>Charging orders by way of execution</i>	484
<i>Charging orders on funds belonging to lunatic debtor</i>	485
<i>The fund charged must be standing in lunatic's name</i>	486
<i>Practice</i>	487
<i>Where fund charged is in court, stop order necessary</i>	488
<i>Form of order where debtor partly trustee of fund and partly beneficiary</i> ..	489
<i>Charging orders on share of debtor in a partnership</i>	490

SUB-SECTION (4).—*Voluntary Judgments.*

<i>Cognovits and warrants to confess judgment</i>	491
<i>Must be attested by solicitor of debtor</i>	492
<i>Disputing validity of warrant</i>	493
<i>Warrant to two may be entered up by survivor</i>	494
<i>Must be registered</i>	495
<i>Must be filed within twenty-one days</i>	496
<i>Memorandum of satisfaction</i>	497
<i>Acts apply to foreign as well as English warrants, and provisions cannot be waived</i>	498
<i>Judge's orders made by consent</i>	499
<i>Attestation by solicitor not necessary in case of a judge's order</i>	500

SUB-SECTION (5).—*Crown debts, etc.*

<i>Crown debts, etc., not to effect debtor's lands until taken in execution</i> ..	501
<i>Irish Acts</i>	502
<i>Lands Charges Act, 1900</i>	502A

SUB-SECTION (6).—*Lites pendentes.*

<i>Lis pendens do not bind lands unless registered</i>	503
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Nature and
division of
liens.

466. As has been already observed (5) a LIEN (a) is an obligation

(a) The use of the word "lien," which is a French word signifying "a tie," is of comparatively modern date in our law language. The right of retainer which was allowed by the English law, at least as early as the reign of Edward IV., is not mentioned by this name in the early reports; and the word "lien" appears not to have found its way into the law dictionaries so late as 1671 and 1672. Editions of *Dermes de la Ley*, and of *Cowell's Interpreter*, printed in those years, do not contain it. The want of precision in its use is remarkable. A common law lien depends upon retainer; and as there can be no retainer without possession, the word itself is often said to imply possession, although it originally had no such force; and even at law it is used to denote the right of a judgment creditor. But

which by implication of law, and not by express contract, binds real or personal estate for the discharge of a debt or engagement; but does not pass any property in the subject of the lien (*b*). And a contract expressed to be for "a lien" excludes such a lien, as, but for the contract, might have arisen by force of law (*c*). Liens are either non-possessory or possessory. Possessory liens depend on the possession of the creditor, and will be treated of in the next chapter. Non-possessory liens bind the real or personal property of the debtor, and do not require possession of it by the creditor. They are either *judicial* or *equitable*.

Paragraphs
466—468

SECTION I.

Of Judicial Liens.

467. *Judicial* liens are obligations established by the judgments and orders of courts of justice, enforceable by judicial process against the property which is bound, but giving no instant right of possession.

Definition of
judicial lien.

SUB-SECTION (1).—*Judgment Debts.*

468. A judgment debt is a debt which, having been established by the judgment of some one of certain courts of justice, or by the acknowledgment of the debtor, may be enforced by execution against the real and personal estate of the latter. Up to 1864, a judgment creditor acquired, by virtue of his judgment, a lien on the property of the debtor, which, if properly registered, could not be defeated by any act of the latter (*d*). However, by 27 & 28 Vict. c. 112, s. 1, it was enacted that no judgment (which word includes registered decrees, orders of courts of equity, and bankruptcy and other orders having the operation of a judgment (*e*)) statute or recognizance to be entered up after July 29th, 1864,

Judgment
debts now
charge lands
only where
actually
delivered in
execution.

in equity it is used not only in the common law sense, and also as descriptive of an equitable right, not depending upon possession (such as the vendor's lien for the purchase-money of land), but is also often applied to equitable mortgages, and securities of a like nature, which rest simply upon contract. Although contracts are sometimes expressed to be made for mercantile liens, no actual liens are so conferred. The express stipulation and agreement for a security excludes the lien, and limits the rights by the extent of the express contract. *Expressum facit cessare tacitum*. Per Sir W. GRANT, *Gladstone v. Birley*, 2 Mer. at p. 404; per Lord WESTBURY, *Re Leith's Estate, Chambers v. Davidson*, L. R. 1 P. C. at p. 305.

(*b*) *Wilson v. Heather*, 5 Taunt. 642, per GIBBS, C.J.; *Gladstone v. Birley*, 2 Mer. 401, per Sir W. GRANT; *Re Leith's Estate, Chambers v. Davidson*, L. R. 1 P. C. 296, per Lord WESTBURY.

(*c*) *Walker v. Birch*, 6 T. R. 258, per Lord KENYON; *Stevenson v. Blakelock*, 1 Mau. & S. 535, per Lord ELLENBOROUGH; *Re Leith's Estate, Chambers v. Davidson*, *supra*, per Lord WESTBURY; *Exp. M'Kenna, The City Bank Case*, 3 De G. F. & J. 629.

(*d*) By virtue of the combined operation of 13 Edward 1, c. 18; Statute of Frauds, s. 10; 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 28; and 23 & 24 Vict. c. 38.

(*e*) 27 & 28 Vict. c. 112, s. 1.

Paragraphs
468—469

shall affect any land, corporeal or incorporeal, until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or *other lawful authority* in pursuance of such judgment statute or recognizance. So that now, a judgment is not a charge on the land until the judgment creditor has either issued a writ of *elegit* on which the sheriff has made his return (*f*), or unless a receiver of the debtor's land has been appointed by way of equitable execution. It follows that a judgment debt cannot be made a charge on a reversion (*g*).

By s. 3 of 27 & 28 Vict. c. 112, every writ, or other process of execution of any judgment statute or recognizance, by virtue whereof any land has been actually delivered in execution, must be registered, and re-registered every five years, in manner provided by a previous Act (23 & 24 Vict. c. 38), but in the name of the debtor (instead of as under such Act in the name of the creditor); and no prior registration of the judgment is (as was formerly the case) to be necessary.

Judgment
creditor can
now obtain
sale of the
land.

469. By s. 4 of the 27 & 28 Vict. c. 112, it is provided that every creditor to whom any land of his debtor shall have been actually delivered in execution, and whose writ, or other process of execution, shall be duly registered, shall be entitled forthwith, or at any time afterwards, while such registry shall remain in force, to obtain from the Court of Chancery (now the Chancery Division) upon petition, an order for the sale of the debtor's interest in such land. Every such petition may be served on the debtor only, and thereupon the court is to direct all such inquiries to be made as to the nature and particulars of the debtor's interest in the land, and his title thereto, as shall appear to be necessary or proper. And in making such inquiries (and generally in carrying into effect such order for sale) the practice of the court with respect to sales of real estates of deceased persons for the payment of debts, is to be adopted and followed, so far as may be found conveniently applicable. By s. 5, it is provided that, where it appears that any other judgment debt, statute, or recognizance is a prior charge on the land, notice is to be given to the prior chargee, who is thenceforth to be bound by the order for sale. The proceeds of the sale are to be distributed among the persons who may be found entitled thereto, according to their respective priorities.

By s. 6, it is enacted, that every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such bond in execution, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

(*f*) *Guest v. Cowbridge Rail. Co.*, L. R. 6 Eq. 619.

(*g*) *Hoad-Barrs v. Cathcart*, [1895] 2 Ch. 411.

470. The above provisions for registration and re-registration of writs or other processes of execution, were only necessary in order to give the right to a sale ; and consequently, as proceedings under an *elegit* or on the appointment of a receiver, do not require anything to be done on the land itself, a *bonâ fide* purchaser from the judgment debtor had no means of knowing whether the land had been actually delivered in execution or not, and yet ran the risk of discovering, after payment of his purchase money, that the land had been actually delivered in execution, and that the execution creditor had thereby obtained a lien binding the land in his, the purchaser's hands, notwithstanding his want of notice (*h*). To put an end to this injustice, a short Act was passed in 1888 (*i*) (**502A**) by which it was enacted *inter alia* as follows :—

Paragraph
470

As against
bonâ fide
purchaser's
lands,
proceedings
by way of
execution
against lands
must now be
registered.

Sect. 5.—“(1) There shall be established and kept at the office of Land Registry, a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment statute or recognizance, and any order appointing a receiver or sequestrator of land.

“(2) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

“(3) The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time ; and, if renewed, shall have effect for five years from the date of the renewal.

“(4) Registration of a writ or order, in pursuance of this section, shall have the same effect as, and make unnecessary, registration thereof in the central office of the Supreme Court of Judicature, in pursuance of any other Act.

Sect. 6. “Every such writ and order, as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land, unless the writ or order is, for the time being, registered in pursuance of this Act (*j*).

(*h*) *Re Pope*, 17 Q. B. D. 743.

(*i*) 51 & 52 Vict. c. 51. The Lands Charges Registration and Searches Act, 1888.

(*j*) By the Land Charges Act, 1900 (63 & 64 Vict. c. 26), sect. 2, a judgment, whether entered on behalf of the Crown or not, is not to operate as a charge until registered as above. And sect. 6 of the Act of 1888 is extended to every writ and order affecting land issued or made by any Court for the purpose of enforcing a judgment, whether obtained by the Crown or not.

Paragraphs
470—471

Provided that,—

(b) “Where the proceeding in which the writ or order was issued or made, is, for the time being, registered as a *lis pendens*, in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.”

Removal of
judgments
from inferior
courts.

471. In all cases (*k*) where final judgment is obtained in any inferior court of record, in which a barrister of not less than seven years' standing acts as judge, assessor, or assistant, and where any rule or order is made by any such inferior court of record, whereby any money, costs, charges, or expenses shall be payable to any person, the judges of any of the superior courts of record at Westminster, or any judge of any of the said courts at chambers were authorized, (either in term or vacation), upon the application of, or on behalf of any person who should recover such judgment, or to whom any money, costs, charges, or expenses should be payable by such rule or order, and upon the production of the record of such judgment, or of such rule or order (the same being under the seal of the inferior court and the signature of the proper officer thereof), to order such judgment, rule, or order to be removed into such superior court; and thereupon the same has the force of a judgment recovered in, or a rule or order made by, such superior court. And all proceedings may be taken thereupon, or by reason or in consequence thereof, as if it had been originally recovered in or made by the superior court, and the costs of the application and removal shall be recovered as if the same were part of such judgment, rule, or order.

But (*l*) no such judgment was to bind any lands, tenements, or hereditaments, as to purchasers, mortgagees or creditors, unless, after removal, it were registered, and if necessary re-registered, as it must have been if originally entered up in one of the superior courts. But after the passing of the Act every such judgment, rule or order so registered or re-registered, was made as binding as other judgments, rules or orders of the superior courts. The provisions of this Act must of course now be read with reference to 27 & 28 Vict. c. 112 (**468**).

The superior court will assume that the judgment removed is valid, and will not inquire into the regularity of the proceeding upon which it is founded (*m*). The Act was held not to apply to judgments of County Courts established under 9 & 10 Vict. c. 95 (*n*),

(*k*) 1 & 2 Vict. c. 110, s. 22. Corresponding Irish Act, 3 & 4 Vict. c. 105, s. 30.

(*l*) 18 & 19 Vict. c. 15, s. 7.

(*m*) *Simons v. Count de Wints*, 8 Dowl. P. C. 646.

(*n*) *Moreton v. Holt*, 10 Ex. 707.

the intention of which was to confine the remedies of the creditor to such as were specially given to him by that Act, though it was otherwise as to the judgments of the old County Courts (o). Paragraphs
471—472

A judgment by the equity side of an inferior court, such as of that of the Vice-Warden of the Stannaries, might also be removed under this section (p).

As to the registration of judgments at the present time under the Land Charges Act, 1900, see (502A).

472. The Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 1, provided, that where judgment should be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively for any debt, damages or costs, a certificate thereof in the form prescribed by the Act, signed by the proper officer of the court where the judgment had been obtained or entered up, and registered by the Master of the Court of Common Pleas at Dublin (where the judgment was obtained at Westminster) in a register to be called "The Register for English Judgments," and by the Senior Master of the Court of Common Pleas at Westminster (where the judgment was obtained in Dublin) in a register to be called "The Register for Irish Judgments," should from the date of registration be of the same force and effect, and all proceedings might be taken thereon, as if the judgment had been originally obtained or entered up on the date of such registration in the court in which it was so registered; and all reasonable costs and charges of obtaining and registering such certificate should be recovered as if the same were part of the original judgment. Provided that no certificate of any such judgment should be so registered more than twelve months after the date of the judgment, unless leave should have been first obtained from the court, or a judge of the court, in which it is sought to register such certificate.

Scotch and Irish judgments may now be made to affect English lands and vice versa.

In like manner, by s. 2, where judgment had been obtained or entered up in one of the same courts at Westminster or Dublin, for any debt damages or costs, a like certificate thereof, registered at the office in Edinburgh for the registration of deeds bonds protests and other writs registered in the books of council and session in "The Register for English and Irish Judgments," in like manner as a bond executed according to the law of Scotland, with a clause of registration for execution therein contained, should, from the date of registration, be of the same force and effect as a decret of

(o) *Williams v. Jones*, 13 Mee. & W. 628.

(p) *Harvey v. Gilbard*, 7 Dowl. P. C. 616. The jurisdiction of the Lord Warden of the Stannaries is now vested in the Court of Appeal. (Judicature Act, 1873, s. 18 (3).)

Paragraphs
472—473

the Court of Session. And all proceedings might be had on an extract of such certificate, as if the judgment had been a decret originally pronounced in the Court of Session on the date of such registration; with a similar provision as to costs, charges, and expenses, and a proviso that no certificate should be registered more than twelve months from the date of the judgment, unless leave should have first been obtained from the Lord Ordinary on the bills.

And by s. 3, on the registration at Westminster or at Dublin respectively, of a certificate of an extracted decret of the Court of Session in Scotland, purporting to be signed by the extractor of the Court of Session, or other officer duly authorized, or of a certificate of an extracted decret of registration in the books of Council and Session, purporting to be signed by the keeper of the register of deeds, etc., registered for execution in the books of Council and Session, for the payment of any debt, damages or expenses, in a register to be kept in the Court of Common Pleas at Westminster and Dublin respectively, to be called "The Register for Scotch Judgments," the certificate should from the date of registration be of the same force and effect as a judgment obtained or entered up in the court in which it was so registered; and the costs of obtaining and registering the certificate should be recoverable in like manner as if the same were part of the decret of which it is a certificate. Provided that no certificate should be registered more than twelve months after the date of the decret, unless leave should have been first obtained from the court, or a judge of the court, in which it was sought to register such certificate. And where a note of suspension or sist of execution of any such decret should have been granted, on the production of a certificate thereof to a judge of the court in which the certificate of decret had been registered, execution on the registered certificate should be stayed until production of a certificate that the sist had been recalled or has expired, or of a decret of the court repelling the reasons of suspension.

And by s. 4, the Courts of Common Pleas at Westminster and Dublin respectively, and the Court of Session in Scotland, had the same control and jurisdiction over any judgment or decret, or any certificate thereof registered under the Act in such courts respectively, as they had at the passing of the Act over any judgment or decret in their own courts, but so far only as relates to execution under the Act.

473. The effect of an ordinary judgment under the Irish Act (3 & 4 Vict. c. 105), s. 28 (which corresponded with the English Act (1 & 2 Vict. c. 110)) was altered by 13 & 14 Vict. c. 29, ss. 6—11 (*q*),

(*q*) Amended by 21 & 22 Vict. c. 105. As to the form of the affidavit, see *Thorp v. Browne*, L. R. 2 H. L. 220, and cases there.

which provides that the creditor under any judgment in a superior court, or decree or order in equity, or rule in a court of common law, or order in bankruptcy or lunacy, having the effect of a judgment, or any judgment obtained in an inferior and removed into a superior court, may file in the superior court or court of equity, or (in case of an order in bankruptcy or lunacy) in the Court of Chancery in Ireland, an affidavit containing the particulars mentioned in the Act, which may be registered in the office for registry of deeds, conveyances and wills in Ireland, the creditor being deemed to be the grantee, the debtor the grantor, and the debt the consideration; and the registration of which shall vest in the creditor all the hereditaments mentioned therein, for all the estate and interest possessed or capable of being created by the debtor therein, but subject to redemption on payment of the debt mentioned in the affidavit. And the creditor shall have the same remedies in respect of the hereditaments as if a conveyance subject to redemption had been made and registered; and every such voluntary conveyance made subsequent to the date of the judgment mentioned in the affidavit, as would be void against purchasers for money or other good consideration, shall be void as against the creditor registering the affidavit. But the Act does not affect the law concerning conveyances and other Acts made to delay, hinder or defraud creditors; and the statute of limitations runs in favour of the debtor from the date of the judgment, and not from the date of the registration (r).

Such chattel interests in lands, tenements or hereditaments, as might have been taken in execution under any writ of *fi. fa.* if the Act of 3 & 4 Vict. c. 105 (Ireland), had not passed, may be taken in execution notwithstanding the present Act. And in the administration of the assets of any judgment debtor dying seised of any estate or interest in lands, tenements or hereditaments, the rights of the judgment creditor are preserved.

This Act does not alter the rule that the judgment only operates upon the estate and interest which the debtor had or might create by virtue of any disposing power, the object being only to compel the creditor to specify the lands upon which the judgment is to attach (s). A judgment may be registered under it as a mortgage against an incorporated railway company (t).

By 12 & 13 Vict. c. 95, s. 2, the powers of 3 & 4 Vict. c. 105, were declared not to extend to future judgments in respect of any sum due for principal and interest not exceeding 150*l.*, or to any decree, order or rule where the whole amount ordered to be paid

(r) *Johnson v. Lowry*, [1900] 1 Ir. R. 316.

(s) *Eyre v. M'Dowell*, 9 H. L. C. 619.

(t) *Re The Bagnalstown and Wexford Rail. Co., Exp. Bagnall*, 13 L. T. (N.S.) 63. As to the effect of s. 10, as an exception referred to in s. 1, see *Exp. Garrard*, 14 Ir. Ch. Rep. 466.

Paragraphs
473—474

should not exceed 150*l.* ; and new provisions are enacted respecting judgments, decrees, orders and rules relating to sums of less amount.

By the Record of Title Act (Ireland), 1865, c. 88, s. 42, no judgment, recognizance, Crown bond, *lis pendens*, acceptance of office, inquisition, decree or order, shall be a charge upon or affect the recorded land until a memorandum with verification shall be lodged with the officer for record ; and by s. 43, such charges must be re-entered before the end of every five years from entry : and no such charge shall be of any effect as against a purchaser for valuable consideration or mortgagee of a recorded estate, unless the same shall have been entered or re-entered on the record within five years before the recording of his purchase or judgment, and no such purchaser or mortgagee shall be affected by express or implied notice of any such charge.

SUB-SECTION (2).—*Orders for Payment of Money.*

Orders for
payment may
now be
enforced like
judgments.

474. By 1 & 2 Vict. c. 110, s. 18, all decrees or orders of Courts of Equity, rules of Courts of Common Law, or orders of a superior jurisdiction in bankruptcy, and of the Lord Chancellor (and Lords Justices) in lunacy, whereby any sum of money or any costs, charges or expenses should be payable to any person, *had the effect of judgments in Superior Courts of Common Law* ; and the persons to whom such moneys are payable were judgment creditors within the meaning of the Act, and had the same remedies as were given to judgment creditors ; and the powers given by the Act to the judges of the Superior Courts of Common Law, with respect to matters depending therein, might be exercised by Courts of Equity with respect to matters therein depending and by the judges in bankruptcy, and the Lord Chancellor (and Lords Justices) in lunacy (*u*).

The like effect was given to decrees and orders of the High Court of Admiralty, which was made a Court of Record (*x*) ; but prior to the Judicature Act a judgment or order of the Court of Probate under the Court of Probate Act did not create a charge upon lands under 1 & 2 Vict. c. 110, s. 19 (*y*). Now, however, by the combined effect

(*u*) Irish Act, 3 & 4 Vict. c. 105, s. 27 ; but see 13 & 14 Vict. c. 29, ss. 1, 2, (Ir.)

(*x*) Admiralty Court Jurisdiction Act, 1861 (24 Vict. c. 10), ss. 14, 15 ; and all powers of enforcing judgments possessed by the superior courts of common law or any judge thereof, with respect to matters depending in the same courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the Court of Admiralty with respect to matters therein depending ; and all remedies possessed by judgment creditors shall be in like manner possessed by persons to whom any moneys, costs, charges or expenses are by such orders or decrees of the Court of Admiralty directed to be paid. Irish Act, 30 & 31 Vict. c. 114, s. 73.

(*y*) 20 & 21 Vict. c. 77, s. 25 ; *Pratt v. Bull*, 4 Giff. 117 ; but where a decree made under the Divorce Act (20 & 21 Vict. c. 85), s. 52, had been registered under 1 & 2 Vict. c. 110, the Court of Common Pleas refused to expunge the registration. *Exp. Holden*, 13 C. B. (N.S.) 641.

of Order XLII. rr. 3 and 24 of the Rules of the Supreme Court, 1883, a judgment *or order* for payment of money, costs, charges or expenses made by any Court whose jurisdiction is transferred to the High Court of Justice by the Judicature Act, 1873. gives the person to whom the money, costs, charges or expenses are payable, all the rights of an ordinary "judgment creditor." An order for sequestration is not, however, an order for payment of money within the statute or rules; the effect of such a proceeding being, as before the Act, that the property levied under the sequestration does not belong to the person at whose instance it was obtained, but is applied according to the rights and priorities of the incumbrancers (z).

Paragraphs
474—479

475. An order under the above provisions must be a final order for the payment of a specific sum of money, or of a sum the amount of which can be ascertained by the mere computation of interest or taxation of costs (a). A mere order for an account, with a direction to pay what is found due, where a set-off is claimed, being only an order for taking an account under which nothing may become payable to the plaintiff, will not have the effect of a judgment (b). A decree for specific performance, with a reference to compute and tax interest and costs, and an order to pay the amount found due with the purchase money, appears to be a judgment within the rule, being an order to pay a definite sum and a final adjudication; and such a decree has been held for the purposes of priority to constitute a judgment debt (c).

The order must be a final and specific.

476. An order for payment of a sum of money into court within a limited time, was said not to be within the Act (d).

Orders for payment into court.

477. Payment of a sum of money or costs ordered to be paid by an award, may now by leave of the court or a judge be enforced in the same manner as a judgment or order to the same effect (e).

Payment of money ordered by award.

478. The Act only applies to those costs, charges and expenses, the obligation to pay which appears on the face of the order or decree, and not to those the title to which is incomplete without some further act of the creditor (f). It is not, however, necessary in the case of costs that an order for payment of the specific sum found due by the taxing master should be obtained.

Act inapplicable where creditor has to do some further act.

479. When a judgment or order shall have been made for payment of costs in any suit, and such suit shall afterwards abate,

Reviving abated suit after order for payment of costs.

(z) *Burne v. Robinson*, 7 Ir. Eq. R. 188.

(a) *Garner v. Briggs*, 4 Jur. (N.S.) 230.

(b) *Chadwick v. Holt*, 8 De G. M. & G. 584.

(c) *Duke of Beaufort v. Phillips*, 1 De G. & Sm. 321; but see *Chadwick v. Holt*, *supra*.

(d) *Gibbs v. Pike*, 8 Mee. & W. 223.

(e) Arbitration Act, 1889, s. 12; for practice see Annual Practice, sub-title, "ARBITRATION ACT."

(f) *Jones v. Williams*, 8 Mee. & W. 349.

Paragraphs
479—483

any person interested under the judgment, may from time to time revive the suit, and prosecute and enforce the decree or order (*g*).

Order for
payment of
solicitor's bill.

480. A judge's order under the Act 6 & 7 Vict. c. 73, s. 43, ordering judgment to be entered up for the taxed amount of a solicitor's bill, has the same effect as a rule of court for payment of money under s. 18 of the Judgments Act (1 & 2 Vict. c. 110), and the costs of an action brought to recover the taxed costs will be disallowed (*h*).

Orders in
lunacy.

481. An order in lunacy directing taxation of costs, with an inquiry if it would be proper to raise them by sale or mortgage of the real estate, does not make the costs a judgment debt or a charge in equity on the real estate, though it seems it would be otherwise if the costs were directed to be paid (*i*). Nor did the *allocatur* of the master of a court of common law (*k*), nor, it seems, the certificate of the chief clerk (master) in the Chancery Division (*l*), constitute an order for payment of money within s. 18. The right of the creditor under an order for payment of costs, dates (*m*) from the first registration of the certificate of taxation.

Judgments
of contingent
debts.

482. The statute applies to a judgment entered upon a contingent debt; though where the property charged was an annuity, the payments of the annuity which accrued before the judgment debt became actually due, were held not to be effected thereby (*n*).

Order must
be for
payment to
the creditor
himself.

483. Orders for the payment of money are within the Act, only (*o*) when the money is ordered to be paid to the creditor, not when it is to be paid for his benefit merely; and because the statute always contemplates payment to some person, no judgment can be registered effectually which orders money to be paid into court. This difficulty will be avoided by ordering, when it can be done with safety, the payment to be made to the plaintiff upon his undertaking to pay the money into court; or, in the case of a tenant for life, by ordering payment to the remainderman upon trust during the life interest (*p*).

(*g*) 33 & 34 Vict. c. 28 (Attorneys and Solicitors Act, 1870), s. 19.

(*h*) *Griffiths v. Hughes*, 16 Mee. & W. 809.

(*i*) *Stedman v. Hart*, Kay, 607.

(*k*) *Shaw v. Neale*, 20 Beav. at p. 174, and see 6 H. L. C. 581 (553).

(*l*) *Mansfield v. Ogle*, 5 Jur. (N.S.) 419.

(*m*) *Hargrave v. Hargrave*, 23 Beav. 484.

(*n*) *Youngehusband v. Gisborne*, 1 De G. & Sm. 209.

(*o*) *Crowther v. Crowther*, 2 Jur. (N.S.) 274.

(*p*) *Wand v. Docker*, 5 Jur. (N.S.) 1287; *Ward v. Shakeshaft*, 2 L. T. (N.S.) 203; see 1 Dr. & Sm. 269; *Gibbs v. Pike*, 8 Mee. & W. 223.

SUB-SECTION (3).—*Charging Orders.*Paragraphs
484—485

484. An order charging stock or shares may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order are such as are directed, and the effect is such as is provided by the Acts cited below (*q*). Under these the order may charge all the interest of the judgment debtor (whether in possession, remainder or reversion, and whether vested or contingent), in government or other stock, funds or annuities, or stock or shares in any public company in England, incorporated or otherwise, and whether standing in the name of or in trust for the judgment debtor, and including such property when standing in the name of the Paymaster-General (*r*), and the interest, dividends and annual produce thereof. But, as to such property when standing in the name of the Paymaster-General, no such order is to prevent the Bank of England, or any public company, from permitting the transfer of, or paying the same respectively in such manner as the court shall direct, or shall have any greater effect than if the judgment debtor had charged the property in favour of the creditor, with the amount mentioned in any such order. The order entitles the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; but no proceedings may be taken to obtain the benefit of the charge till the expiration of six calendar months from the date of the charging order (*q*).

The effect of the order is to create an immediate charge (*s*); but only to the extent to which the debtor himself could have charged the property. The order, therefore, will be inoperative, if the debt which it was intended to secure, be founded upon an illegal contract (*t*). It may be made to secure the costs of a suit to which the owner of the property to be charged is liable, before they have been taxed (*u*).

485. An order may be made charging funds standing in the name of the Paymaster-General to the credit of a person of unsound mind, against whom judgment has been obtained; and it is neither necessary nor proper that such orders should be made subject to any control or interference by the lunacy judges, whose duty is

(*q*) Rules, 1883, Order XLVI. 1; 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; Irish Acts, 3 & 4 Vict. c. 105; 16 & 17 Vict. c. 113, ss. 132–5. As to the mode of securing the charge by notice in lieu of issuing a *distringas*, see (845).

(*r*) The order may be made by a King's Bench Judge, although the fund may be in the hands of the Paymaster-General under a judgment or order made in a Chancery action. Mere notice to the Paymaster-General is enough, and a stop order is not necessary. (*Brereton v. Edwards*, 21 Q. B. D. 488.)

(*s*) *Montefiore v. Behrens*, L. R. 1 Eq. 171; *Re Blakeley Ordnance Co., Coates' Case*, 46 L. J. Ch. 367.

(*t*) *Re Onslow's Trusts*, L. R. 20 Eq. 677.

(*u*) *Burns v. Irving*, 3 Ch. D. 291.

Paragraphs
485—487

confined to seeing that the property of the lunatic is being properly administered, and who have no jurisdiction to adjudicate between him and his creditor (*x*).

The fund
charged
must be
standing in
lunatic's
name.

486. The property to be charged must be standing in the name of, or in trust for the judgment debtor, or for him and others (*y*) ; it is not sufficient that he has merely a beneficial interest in it, or in the proceeds of it when sold (*z*). It is, therefore, a good equitable plea to an action against the holder of the property for permitting its transfer after notice of a charging order *nisi*, that the judgment debtor had no beneficial interest in it (*a*) ; but the existence of a trust for sale will not prevent the charge, so long as the debtor retains an interest in the property itself (*b*). And by the expression “public company” is to be understood (*c*) a company which has the attributes of publicity, by virtue of an obligation to return to public officers the names and places of abode of its members and of the officers appointed to sue and be sued on its behalf, whether the capital be divided into shares or not.

Practice.

487. As the charging order may affect funds which are not the subject of litigation, it need not be entitled in any cause or matter (*d*), but only in the Acts. It is made in the first instance *ex parte* without notice to the judgment debtor, and is only to show cause why the property should not be charged ; and it may properly fix a certain and reasonable period at which cause is to be shown (*e*). But it must not be conditional in form (*f*). In the case of government stocks, funds, or annuities or shares in public companies standing in the name of the judgment debtor “in his own right,” (which words do not exclude (*g*) property which has been equitably mortgaged if it be still standing in the name of the debtor), or in trust for the debtor, the order restrains the Bank of England or public company from permitting a transfer till the order is made absolute or is discharged ; and any person or corporation permitting a transfer after notice becomes liable to the judgment creditor, against whom no disposition by the debtor in the mean time is effectual. The order will be made absolute after proof of

(*x*) *Horne v. Pountain*, 23 Q. B. D. 264 ; and see also *Re Leavesley*, [1891] 2 Ch. 1, and *Re Plenderleith*, [1893] 3 Ch. 332.

(*y*) *South Western Loan Co. v. Robertson*, 8 Q. B. D. 17.

(*z*) *Taylor v. Turnbull*, 4 H. & N. 495 ; *Dixon v. Wrench*, L. R. 4 Ex. 154. A pension is therefore not within the Act. (*Morris v. Manesty*, 7 Q. B. 674.)

(*a*) *Gill v. Continental Gas Co.*, L. R. 7 Ex. 332.

(*b*) *Cragg v. Taylor*, L. R. 2 Ex. 131 ; *South Western Loan Co. v. Robertson*, *supra*.

(*c*) *Macintyre v. Connell*, 15 Jur. 529 ; see *Graham v. Connell*, 19 L. J. Ex. 361.

(*d*) *Lord Hastings v. Beavan*, 10 W. R. 206.

(*e*) 1 & 2 Vict. c. 110, s. 15 ; *Robinson v. Burbidge*, 9 C. B. 289.

(*f*) *Gibbs v. Flight*, 13 C. B. 803.

(*g*) *Fuller v. Earle*, 7 Ex. 796.

notice thereof to the judgment debtor, his solicitor or agent, and unless the judgment debtor shall, within a time to be mentioned in the order, show to a judge sufficient cause to the contrary. A charging order may be made absolute, although costs have been incurred by the trustee in whose name the fund is standing, and who has no other fund for repayment of them, because the order does not affect the right of the court to give directions as to the transfer or payment (*h*).

The court or judge may discharge or vary the order on the application of the debtor or any person interested, and award such costs upon the application as shall be thought fit (*i*).

488. Where the fund affected by the charging order is in court, a stop order must be obtained (**1243**). No order will be made on petition for payment of the fund to the creditor without the consent of the owner of it, even though he do not appear on the petition (*k*).

Paragraphs
487—488

Where fund
charged is in
court, stop
order
necessary.

Though a charging order made in terms applicable to the whole fund will be bad, so far as relates to the interest of a person who has already established a lien upon it, the order will yet extend to whatever interest the debtor had when it was obtained, and a stop order will be made excepting the interests of the prior incumbrancers (*l*).

A stop order on funds standing in the Chancery Division of the High Court, may be had by a person who has obtained judgment in another division, without a preliminary charging order (*m*).

The grant of a stop order does not decide the rights of any of the parties, but merely prevents payment or transfer out of court, of either principal or (*semble*) interest (*n*) without notice to the claimant, who is thus enabled to appear and support his rights (*o*). It will be granted only on admission or proof of title, and so as not (even by consent) to prejudice the question of the validity of the incumbrance (*p*). It operates only as to the particular charges in respect of which it was obtained (*q*). Where obtained by the mortgagee of a person only contingently entitled, no notice need be given to the claimant of an application to pay or transfer out of court, if the contingency does not happen (*r*).

A stop order will be granted against a cheque drawn by the

h) *Smith v. Youde*, 2 Fost. & Fin. 376.

i) 1 & 2 Vict. c. 110, s. 15.

k) *Re Nowell*, 9 Jur. (N.S.) 788; *Whitfield v. Prickett*, 13 Sim. 259; see *Courtoy v. Vincent*, 15 Beav. 486.

l) *Hulkes v. Day*, 10 Sim. 41; *Robinson v. Wood*, 5 Beav. 388.

m) *Hopewell v. Barnes*, 1 Ch. D. 630.

n) *Mack v. Postle*, [1894] 2 Ch. 449.

o) *Lucas v. Peacock*, 8 Beav. 1.

p) *Winchelsea v. Garrety*, 1 Beav. 223.

q) *Macleod v. Buchanan*, 4 De G. J. & S. 265.

r) *Vernon v. Croft*, 58 L. T. 919.

Paragraphs
488—489

Paymaster-General in favour of the judgment debtor, if the cheque have not been delivered out; but the court will not generally give leave to the sheriff to seize it in the hands of the Paymaster-General, not considering, under such circumstances, that it is the property of the debtor (s). Where, however, a cheque was delivered under a power of attorney from the judgment debtor, under circumstances which induced the person to whom it was delivered to return the cheque to the Accountant-General's office, the sheriff had leave to seize it there; because, though lying in the office of the Accountant-General, it was not considered to be in his possession, but to be the property of the judgment debtor, as if it had not been returned (t).

A stop order may also be granted against deeds deposited in court (u); but such an order was refused (x) to a mortgagee of the reversion of an estate, when the deeds had been brought in by the owner of the particular estate under a decree, and merely for the purposes of the suit.

In applying for a stop order, it is not necessary to serve the petition or summons upon the parties to the cause, or upon the persons interested in such parts of the stocks or property as are not sought to be affected; but the person who obtains the order to prevent transfer or payment of moneys or securities in court to the general credit of any cause or matter, or to the account of any class of persons, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such moneys or securities, shall be liable, at the discretion of the court or a judge, to pay any costs, charges and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or to any person interested in any such moneys or securities (y).

Notwithstanding this order, the assignor of the fund must be served with the petition or summons, and the assignment must be proved or admitted. It must also be shown that he has an interest in the fund, though it is not necessary to prove his title to any particular share of it (z).

Form of
order where
debtor partly
trustee of
fund, and
partly
beneficiary.

489. If stock to be charged be standing in the name of a trustee, upon trust for a debtor, who has partly a beneficial, and partly a fiduciary interest in the dividends, the order will charge so much only of the dividends as is payable to the debtor for his own use and benefit; thus leaving the distribution of the fund to

(s) *Courtoy v. Vincent*, 15 Beav. 486.

(t) *Watts v. Jefferyes*, 3 Mac. & G. 422.

(u) *Williams v. Symonds*, 9 Beav. 523.

(x) *Cotton v. Cotton*, 6 Beav. 96.

(y) Rules, 1883, Order XLVI. 12, 13.

(z) *Wood v. Vincent*, 4 Beav. 419; *Parsons v. Groome*, 4 Beav. 521; *Quarman v. Williams*, 5 Beav. 133.

the discretion of the trustees, and, if necessary, to the order of the court (a). Paragraphs
489—491

490. By the 23rd section of the Partnership Act, 1890, it is enacted as follows:— Charging
orders on
share of
debtor in a
partnership.

“(1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

“(2) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a County Court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may (by the same or a subsequent order) appoint a receiver of that partner's share of profits (whether declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and enquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

“(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

“(4) This section shall apply in the case of a cost book company as if the company were a partnership within the meaning of this Act.”

Under this section the court has power to make an order against the share of a partner in a foreign firm having a place of business in this country (b).

SUB-SECTION (4).—*Voluntary Judgments.*

491. Voluntary judgments (which for many centuries it has been the practice to confess and enter up in pursuance of contracts between debtors and creditors) are entered up under a warrant of attorney to confess judgment in a future action, or under a *cognovit actionem*, which is an acknowledgment of a demand, for the recovery of which a suit has actually been commenced. The condition of a warrant of attorney, that on non-payment at a certain day Cognovits
and warrants
to confess
judgment.

(a) *Fowler v. Churchill*, 11 Mee. & W. 57; and see *South Western Loan Co. v. Robertson*, 8 Q. B. D. 17.

(b) *Brown, Janson & Co. v. Hutchinson & Co.*, [1895] 1 Q. B. 737, on appeal, [1895] 2 Q. B. 126. For the practice under this section, see R. S. C., Order XLVI. rr. 1a and 1b.

Paragraphs
491—492

execution may issue, is not a contract, but a description of the object of the security, and of the means by which, in case of default, the creditor may enforce payment (c). The proper mode of recovering debts so secured, is by entering up judgment in pursuance thereof, and not by action on an implied contract to pay the debt (d). Although the judgment is so entered up under a contract, it passes *in invitum*, the object of the voluntary confession being only to shorten and lessen the cost of the judicial process (e). And the adverse character which is imputed to such judgments is productive of important consequences, where restrictions are imposed upon the alienation of property (459). For if the warrant of attorney be *bonâ fide* given as security for, or to stave off proceedings for the recovery of a debt, and be not part of a contrivance to effect a covert alienation of the property contrary to the restriction, it creates no forfeiture of a lease, which contains a covenant against assignment, with a proviso for re-entry on breach; and is not a breach of a covenant not to charge or incumber, by mortgaging or granting any rent-charge or other incumbrance; or which forbids any assignment, mortgage, or other mode of anticipation, or any act by which income would become payable to any other than a certain person (f). But if the covert intention be shown, the form of security will be no protection against forfeiture.

The voluntary character of these instruments is, however, recognised in the case of infants, who are not allowed either to appoint or appear in court by an attorney (but by guardian only), and who cannot state an account or make any agreement in prejudice of their rights (g).

Must be
attested by
solicitor of
debtor.

492. A warrant of attorney to confess judgment in any personal action or *cognovit actionem*, given by any person, shall not be of any force unless there be present some solicitor of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or *cognovit* before the same is executed; which solicitor shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be solicitor for the person executing the same, and state that he subscribes as such solicitor. And a warrant of attorney or *cognovit* not executed in the manner aforesaid, is not rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was

(c) *Cook v. Fowler*, L. R. 7 H. L. at p. 35, *per* Lord CHELMSFORD.

(d) *Sherborne v. Tollemache*, 13 C. B. (N.S.) 742.

(e) *Per* Lord KENYON, *Doe d. Mitchinson v. Carter*, 8 T. R. at p. 61; *per* Lord TENTERDEN, *Doe d. Wigan v. Jones*, 10 B. & C. at p. 468.

(f) *Doe d. Mitchinson v. Carter*, 8 T. R. 57, 300; *Croft v. Lumley*, 5 El. & Bl. 648; *Avison v. Holmes*, 1 Johns. & H. 530; and see cases in note there.

(g) *Oliver v. Woodroffe*, 4 Mee. & W. 650.

fully informed of the same (*h*). The attestation by a solicitor is not, however, necessary in cases of ejectment (*i*), because the statute is expressly confined to personal actions; nor where the defendant himself is a solicitor (*k*): for then he is in no want of that protection which it was the object of the statute to supply.

Paragraph
492

The solicitor who is required to be present on the part of the defendant must *not* be the solicitor for the plaintiff (*l*); and this rule disqualifies for the office both the London agent of the plaintiff's solicitor, (if he be acting as the agent of the latter in the business), and also a solicitor acting as the clerk of the plaintiff's solicitor, though the latter may also have acted for the defendant (*m*); for there is no distinction between principal and agent, either as to the act done, or the duty which attaches to the person who does it. The disqualification is complete, if it can be shown, or inferred from the evidence, that the solicitor acted in the matter for both parties; even though it be proved that the debtor chose to confide in him, and refused to employ any other. And the rule was not relaxed where further advances had been made after the execution of the warrant, and the objection was not raised till some time had elapsed after judgment was signed and execution levied (*n*).

Further, the debtor's solicitor must be "expressly named by him;" by which, however, it is not meant that every solicitor named or suggested by another person, or even by the plaintiff himself or his solicitor, is necessarily excluded. Such a nomination is indeed a reason for a more jealous scrutiny of the transaction, but the object of the statute is obtained if it be shown that the debtor exercised a free, if not an original, choice in the matter. So long as the solicitor is *bonâ fide* appointed by the debtor himself, it matters not by whom he was introduced, or that he was previously a stranger to the debtor, or even that he was paid by the creditor (*o*).

The solicitor is to attend at the debtor's request, to inform him of the nature and effect of the warrant of *cognovit* before execution. The solicitor is only bound to do this if he be required by the debtor, and is not bound to read the instrument to him unless he desires it. Nor can the debtor complain that proper advice was

(*h*) 1 & 2 Vict. c. 110, ss. 9 and 10; Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 24 and 25; Debtors Act (Ireland), 1872, 35 & 36 Vict. c. 57, ss. 23 and 24.

(*i*) *Doe d. Kingston v. Kingston*, 1 Dowl. P. C. (N.S.) 263.

(*k*) *Chipp v. Harris*, 5 Mee. & W. 430.

(*l*) *Mason v. Kiddle*, 5 Mee. & W. 513.

(*m*) *Pryor v. Swaine*, 2 Dowl. & L. 37; *Durrant v. Blurton*, 9 Dowl. P. C. 1015.

(*n*) *Cooper v. Grant*, 12 C. B. 154; *Rising v. Dolphin*, 8 Dowl. P. C. 309; *Sanderson v. Westley*, 8 Dowl. P. C. 412; *Hirst v. Hannah*, 17 Q. B. 383.

(*o*) *Haigh v. Frost*, 7 Dowl. P. C. 743; *Taylor v. Nicholls*, 6 Mee. & W. 91; *Joel v. Dicker*, 5 Dowl. & L. 1; *Hale v. Dale*, 8 Dowl. P. C. 599; *Pease v. Wells*, 8 Dowl. P. C. 626; *Barnes v. Pendrey*, 7 Dowl. P. C. 747; *Bligh v. Brewer*, 3 Dowl. P. C. 266; see *Rice v. Linsted*, 7 Dowl. P. C. 153.

Paragraphs
492—495

not given him, either by the solicitor's neglect, or in consequence of his own omission to give the solicitor proper explanations (*p*).

The requirements as to the attestation are threefold ; comprising subscription by the solicitor as a witness, a declaration that he is solicitor for the person who executes, and subscription as such solicitor. The attestation, though not necessarily in the words of the statutes, must show by necessary implication that all these requisites have been fulfilled (*q*). The solicitor may have explained the instrument to the debtor, without acting as his solicitor in doing so ; for he may have done it without the debtor's request, or before being employed as his solicitor. And he may subscribe the instrument, yet not as the debtor's solicitor ; because though previously so named, and acting, his employment may cease before the attestation (*r*). It is not necessary for the solicitor to state in the subscription that he is expressly named by the debtor, or that he attended at his request (*s*).

Disputing
validity of
warrant.

493. The defendant himself, though bankrupt, or an outlaw, may dispute, on the ground of undue execution, the validity of a warrant of attorney, or of a judgment which has issued thereon ; but a third person, (unless, like an assignee in bankruptcy, he stands in the debtor's place), cannot do so (*t*). The authority of a solicitor who acts on such an application for an absent debtor must be proved (*u*).

Warrant to
two may be
entered up
by survivor.

494. If the warrant of attorney is to confess judgment to two, the survivor will be allowed to enter up judgment (*x*). But an authority to the plaintiff alone to enter up judgment will not extend to his executor (*y*).

Must be
registered.

495. By 6 & 7 Vict. c. 66, an additional book or index is directed to be provided, in which only the names, additions, and descriptions of the respective defendants or persons giving the warrants or *cognovits* are entered, and which may be searched on payment of the additional fee mentioned in the Act (*z*).

(*p*) *Haigh v. Frost*, 7 Dowl. P. C. 743 ; *Taylor v. Nicholls*, 6 Mee. & W. 91 ; *Joel v. Dicker*, 5 Dowl. & L. 1 ; see *Fisher v. Papanicholas*, 2 Cr. & M. 215.

(*q*) *Pocock v. Pickering*, 18 Q. B. 789 ; *Holt v. Kershaw*, 5 Dowl. & L. 419 ; *Lewis v. Lord Kensington*, 15 L. J. C. P. 100 ; *Phillips v. Gibbs*, 16 Mee. & W. 208.

(*r*) *Hibbert v. Barton*, 10 Mee. & W. 678 ; *Oliver v. Woodroffe*, 4 Mee. & W. 650 ; *Everard v. Poppleton*, 5 Q. B. 181 ; *Poole v. Hobbs*, 8 Dowl. P. C. 113 ; *Potter v. Nicholson*, 8 Mee. & W. 294.

(*s*) *Gay v. Hall*, 5 Dowl. & L. 422.

(*t*) *Taylor v. Nicholls*, 6 Mee. & W. 91 ; *Davis v. Trevanion*, 2 Dowl. & L. 743 ; *Chipp v. Harris*, 5 Mee. & W. 430.

(*u*) *Lewis v. Lord Tankerville*, 11 Mee. & W. 109.

(*x*) *Spong v. Tucker*, 1 Y. & J. 206.

(*y*) *Henshall v. Matthew*, 7 Bing. 337.

(*z*) Warrants of attorney to confess judgments in Ireland are subjected to nearly the same regulations by 3 & 4 Vict. c. 105, ss. 12—18 inclusive.

496. Where such warrant of attorney or *cognovit* or a true copy thereof, is not filed with the proper officer within twenty-one days next after execution, as required by 3 Geo. 4, c. 39 (which makes it necessary to file an affidavit of the time of execution as prescribed by that statute (*a*)), it shall be fraudulent and void. And any defeasance or condition to which the same was subject, shall be written upon the same paper or parchment with the warrant or *cognovit*, before the filing thereof, otherwise the warrant or *cognovit* shall be void (*b*).

Paragraphs
496—499

Must be
filed within
21 days.

The Act of 3 Geo. 4, here referred to, declared that the security and judgment and execution thereon should be fraudulent and void against the assignees in bankruptcy; but it was held that, as between the parties, they might be good (*c*).

497. Power is given (*d*) to any of the judges of the court in which the warrant of attorney or *cognovit* is given, to order a memorandum of satisfaction to be written upon such warrant *cognovit* or copy thereof respectively as aforesaid, if it shall appear that the debt for which it was given has been satisfied or discharged.

Memorandum
of satis-
faction.

498. The Acts apply to warrants of attorney, whether executed in this or in a foreign country (*e*). And it seems that if judgment be signed on a warrant of attorney, not made in compliance with the statutes, the defect cannot be waived (*f*).

Acts apply to
foreign as
well as
English
warrants,
and pro-
visions
cannot be
waived.

499. Where a judge's order, made by consent is given by a defendant in a personal action, whereby the plaintiff is authorized forthwith, or at any future time, to sign or enter up judgment, or to issue or take out execution (whether such order is made subject to any defeasance or condition or not), the order, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, must be filed in the King's Bench (now the Central Office) within twenty-one days after the making of the order, otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void (*g*). And the provisions of 3 Geo. 4, c. 39 (ss. 5, 8) and of 6 & 7 Vict. c. 66, as to the filing warrants of attorney and *cognovits* with the clerk of the docquets and judgments, and for the making entries by such clerk and search in relation thereto, and for entering satisfaction thereon,

Judge's order
made by
consent.

(*a*) *Acraman v. Herniman*, 15 Jur. 1008; see 12 & 13 Vict. c. 106, s. 136.

(*b*) The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 26.

(*c*) *Bennett v. Daniel*, 10 B. & C. 500.

(*d*) 3 Geo. 4, c. 39, s. 8.

(*e*) *Davis v. Trevanion*, 2 Dowl. & L. 743.

(*f*) *Gripper v. Bristow*, 6 Mee. & W. 807.

(*g*) 32 & 33 Vict. c. 62, s. 27.

Paragraphs
499—502

and for fees for search and filing and taking office copies, extend and apply to every such judge's order (*h*).

Attestation
by solicitor
not necessary
in case of
judge's order

500. A consent to a judge's order for staying proceedings on payment of debt and costs does not require the interposition of a solicitor for the debtor, because nothing can be done by virtue of such a consent until the judge's order is made, in which respect it differs from a *cognovit* (*i*).

SUB-SECTION (5).—*Crown Debts, etc.*

Crown debts,
etc., not to
affect debtor's
lands until
taken in
execution.

501. By the Crown Suits, etc., Act, 1865 (*k*), any judgment, decree, or order obtained after the commencement of the Act by or on behalf of the Crown, or any recognizance entered into after the commencement of the Act on the proper account of the Crown, or any inquisition, finding after the commencement of the Act a debt due to the Crown on any obligation or specialty to the Crown made, or any acceptance of office from or under the Crown, accepted after the commencement of the Act, shall not affect any land of whatever tenure as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee, whether with or without notice of the judgment, decree, or other incumbrance, unless a writ of extent or of *diem clausit extremum*, or other writ or process of execution in pursuance of or in relation to such judgment, decree, or other incumbrance, has been issued and registered before the execution of the conveyance or mortgage, and the payment of the purchase or mortgage money. This Act makes no provision for re-registration.

Irish Acts.

502. By the Irish Act, 7 & 8 Vict. c. 90, ss. 11 and 12, no judgment, statute or recognizance, or obligation or specialty on account of the Crown, or any acceptance of office, shall affect any lands, tenements, or hereditaments as to purchasers or mortgagees, unless and until the same shall be registered as directed by the Act, in the Index to Debtors and Accountants to the Crown. By 11 & 12 Vict. c. 120 (*l*), no judgment, Crown bond, rule, decree, order, or *lis pendens*, is to be so registered unless a certificate of its existence, signed by the proper officer of the court in which it was entered or obtained, be subscribed to the memorandum left with the registrar; and by 34 & 35 Vict. c. 72, s. 22, a certified copy duly authenticated according to the Public Records (Ireland) Act, 1867, is substituted for the certificate where the record has been removed to the Public Record Office.

By the 11 & 12 Vict. c. 120 (*m*), it was also made necessary to

(*h*) Id. s. 28.

(*i*) *Thorne v. Neale*, 2 Q. B. 726; *Bray v. Manson*, 8 Mee. & W. 668.

(*k*) 28 & 29 Vict. c. 104, s. 48. As to the mode of registration, see s. 49.

(*l*) Section 12.

(*m*) Section 13.

re-register bonds and recognizances to the Crown so registered which were more than twenty years old from the date thereof. By the Irish Judgment Act, 1871 (*n*), similar provisions were made respecting the re-registration of judgments obtained at the suit of the Crown which should be more than twenty years old from the date thereof, the title of the register-book being directed to be "Re-docketed Crown Bonds, Recognizances and Judgments at the Suit of the Crown."

Paragraphs
502—502A

By the Irish Judgments Act, 1871 (s. 11), no recognizance, Crown bond, judgment at the suit of the Crown, statute, inquisition or acceptance of office registered or re-docketed under 7 & 8 Vict. c. 90, or under 11 & 12 Vict. c. 120, more than four years before the passing of 34 & 35 Vict. c. 72, shall affect lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until the same is re-registered within five years before the execution of the instrument vesting or transferring the legal or equitable right to the estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditor accrued. Provided, that where twenty years from the date of such bond or recognizance had expired or would expire before the expiration of one year before the passing of the Act, the Act should not dispense with the re-docketing under 11 & 12 Vict. within such twenty years, or give any greater validity to the bond or recognizance than it would formerly have had under the last-mentioned Act.

And by s. 12 of the Irish Judgments Act, 1871, no recognizance, Crown bond, judgment at the suit of the Crown, statute, inquisition, or acceptance of office, registered or re-docketed within four years before the passing of the Act, under 7 & 8 Vict. or 11 & 12 Vict., or which subsequently should be registered or re-docketed, or re-registered under either of these Acts, or under 34 & 35 Vict., shall, after five years from the date of such registry, re-docketing, or re-registry, affect lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until the same be registered within five years before the execution of the instrument vesting or transferring the legal or equitable right to the estate or interest, in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditor accrued, and so *toties quoties* at the expiration of every succeeding five years.

As to the provisions of the Record of Title (Ireland) Act, 1865, in relation to Crown debts, etc., see *supra* (473).

502A. By the Land Charges Act, 1900 (*o*), the business of the registrar of judgments has been transferred from the Central Office of the Supreme Court to the Land Registry Office (*p*), and it is

Land Charges
Act, 1900.

Paragraphs
502^A—503

provided (q) that a judgment or recognizance whether obtained or entered into on behalf of the Crown or otherwise shall not operate as a charge on land or on any interest in land or on the unpaid purchase money for any land unless or until a writ or order for the purpose of enforcing it is registered under s. 5 of the Land Charges Registration and Searches Act, 1888(r) (470, 471), and s. 6 of the last-mentioned Act has been made applicable to every writ and order affecting land issued or made by any Court for the purpose of enforcing a judgment . . . and to every delivery in execution or other proceeding taken in pursuance of or in obedience to any such writ or order (s).

SUB-SECTION (6).—*Lites Pendentes*.

Lis pendens
do not bind
lands unless
registered.

503. By 2 & 3 Vict. c. 11, s. 7, no *lis pendens* (1113) shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute containing the name, usual or last place of abode, and title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court of Equity, title of the cause or information, and the day when it was commenced, shall be registered in the Common Pleas (now the Land Registry Office); and the provisions of s. 4, with regard to the re-entering of judgments every five years (470), extend to every case of *lis pendens* registered under the Act.

SECTION II.

Of Equitable Liens.

PARAGRAPH

Principle of such liens.. .. . 504

SUB-SECTION (1).—*The Lien upon Land or other Property for Purchase money.*

<i>Depended at common law on possession</i>	505
<i>In equity founded on honesty</i>	506
<i>Cases in which the lien arises</i>	507
<i>Purchaser has lien for purchase-money paid on account or prematurely</i>	508
<i>Purchaser lien restricted to estate and interest of vendor</i>	509
<i>Purchaser has no lien for money paid knowingly to one of several trustee vendors</i>	510
<i>Benefit of lien transferable</i>	511

SUB-SECTION (2).—*Partnership Liens.*

<i>Partner has liens on co-partner's share for latter's liabilities</i>	512
<i>Foundation of partnership liens</i>	513
<i>Bonâ fide sale to purchaser bars lien</i>	514
<i>After dissolution completed, lien is barred</i>	515
<i>Property to which lien extends</i>	516

(q) Section 2. (r) 51 & 52 Vict. c. 51.
(s) Land Charges Act, 1900, sect. 3.

SUB-SECTION (2)—*Partnership Liens (continued)*—

PARAGRAPH

<i>Does not extend to ownership in common</i>	517
<i>Lien only arises on dissolution unless by express contract, and is then subject to the claims of bonâ fide incumbrancers of whose charges notice has been given</i>	518
<i>Partnership lien after dissolution is extended to the creditors by subrogation</i>	519

SUB-SECTION (3).—*Of Liens for Expenditure upon the Property of another, and herein of Salvage Liens and Liens upon West India Estates.*

<i>In general no lien for money paid for another's benefit</i>	520
<i>Circumstances in which liens are allowed by reason of mistake, etc.</i> ..	521
<i>Lien arises where owner has allowed expenditure by person who expects to reap the benefit</i>	522
<i>No lien in favour of party who has not fulfilled his bargain</i>	523
<i>Salvage liens</i>	524
<i>Salvage liens in favour of managers of dangerous or speculative undertakings</i>	525
<i>Neither owner nor (in general) manager of incumbered estate has lien for expenditure</i>	526
<i>How far a manager's lien affects remaindermen</i>	527
<i>To what a consignee's claim extends</i>	528
<i>Where consignee is also an express trustee of estate</i>	529
<i>Insurer's lien</i>	530

SUB-SECTION (4).—*The Lien of Trustees for Costs, Charges, and Expenses.*

<i>General lien of trustees for costs, charges, and expenses</i>	531
<i>How far trustee of void settlement entitled to costs of defending it</i> ..	532
<i>Trustee has lien on all property into which trust property converted</i> ..	533
<i>Same principle applies to constructive trusts</i>	534
<i>Improper investment of trust funds creates lien on the investment</i> ..	535
<i>Liens on the shares of beneficiaries for sums due to trust estate</i>	536
<i>Misapplication of moneys received under powers</i>	537
<i>Lien in favour of a customer on property or the proceeds of property entrusted by him to broker or factor</i>	538

SUB-SECTION (5).—*Liens in cases of Misappropriation and Waste.*

<i>Lien on deeds wrongfully abstracted by equitable mortgagor</i>	539
<i>Lien on profits of estate for waste</i>	540

SUB-SECTION (6).—*The Lien of Solicitors upon the Fruits of Judgments, apart from Statute.*

<i>Solicitors have a particular lien for costs on fruits of judgments</i>	541
<i>Lien extends to awards of arbitrators and to companies</i>	542
<i>Lien restricted to solicitor's own charges</i>	543
<i>Solicitor of both parties may have lien</i>	544
<i>Is a particular lien</i>	545
<i>How far lien extends to moneys in the hands of the solicitor</i>	546
<i>The lien is paramount to claims of client's trustee in bankruptcy, or administrator, and client cannot relieve adversary from costs</i>	547
<i>How lien enforced</i>	548
<i>Lien does not prevent parties compromising litigation</i>	549
<i>Collusion between plaintiff and defendant</i>	550
<i>Lien may be destroyed</i>	551
<i>How affected by right of set off</i>	552

Paragraphs
504—505

SUB-SECTION (7).—*Solicitor's statutory Charge for Property recovered or preserved.*

	PARAGRAPH
<i>Nature of the charge on property recovered or preserved</i>	553
<i>Cases in which the Act does not apply</i>	554
<i>Charge cannot be defeated except by sale, etc., to bonâ fide purchaser without notice</i>	555
<i>Charge applies to property of infants and married women restrained from anticipation</i>	556
<i>What amounts to recovery or preservation of property for purposes of Act</i>	557
<i>Solicitor entitled to the charge even after he has ceased to be solicitor and in spite of a compromise</i>	558
<i>Personal representatives of solicitor entitled to the charge</i>	559
<i>Quære whether right extends to London agent</i>	560
<i>One court can give charge over property being administered by another</i>	561
<i>Effect of counter-claim or set-off on charge</i>	562
<i>Practice</i>	563
<i>Quære whether solicitor can be heard on appeal</i>	564
<i>Parties liable on judgment ignore the solicitor's charge at their peril</i>	565
<i>Comparison of statutory charge with the solicitor's equitable lien</i>	566

SUB-SECTION (8).—*Maritime Liens.*

<i>Nature of maritime liens for wages, salvage, pilotage, etc.</i>	567
<i>Master not entitled to lien for wages and expenditure apart from statute</i>	568
<i>Provisions of Merchant Shipping Act in favour of master</i>	569
<i>Statutory right in rem for building, repairing, or equipping ships</i>	570
<i>Statutory right in rem for damage to cargo caused by negligence of owner, master, or crew</i>	571
<i>Distinction between maritime lien and statutory remedy against the res</i>	572
<i>Lien of consignee of ship and cargo</i>	573
<i>Owners of cargo have no lien for losses which are the subject of general average</i>	574
<i>Lien for salvage of vessel, etc.</i>	575
<i>Lien for salvage of life</i>	576
<i>Salvage claims arise apart from contract</i>	577
<i>Lien for damage to another vessel or her cargo crew or passengers, limited in amount</i>	578
<i>How far limitation of liability applies to foreign ships</i>	579
<i>Liability arises on each distinct occasion of damage</i>	580
<i>Courts having jurisdiction</i>	581
<i>Practice where shipowner is a liquidating company</i>	582

Principle of
such liens.

504. Equitable liens are founded upon the consideration of a duty or implied intention on the part of the owner of property to make it answerable for a specific claim. They arise independently of possession by the creditor, and are enforceable by sale.

SUB-SECTION (1).—*Of the Lien upon Land and other property for Purchase-money.*

Depended at
common law
on possession.

505. A vendor has a lien for unpaid purchase-money, which, though of an equitable character, was recognized at law as well as in equity; and for the purchase-money of chattels as well as of real estate: but with this distinction, that, inasmuch as there

was not (as a general rule) any lien at law without possession (583), the vendor of land could have no lien at law for purchase-money, after he had executed an absolute conveyance, either upon the land or the deeds (*t*), which, though they may actually be in the vendor's possession, belong of right to the owner of the estate. Nor, for the same reason, had the vendor of chattels any lien for the price after he had parted with possession of them. But the vendor's right in equity against the property is independent of possession, and exists as well after as before conveyance (*u*), and will now be enforced by all the courts under the Judicature Acts.

506. The vendor's lien rests upon the plain principle of equity, that he who has obtained possession of property under a contract for payment of the value, shall not keep it without payment (*x*). In equity founded on honesty.

507. It exists generally (the contract not being illegal (*y*)), in respect of lands of freehold, copyhold or leasehold tenure (*z*), and also in respect of trade machinery (*a*), and, indeed, (according to the latest decision) in respect of personal property generally (*b*), and extends not only to the unpaid price, but also to interest on it from the time the lien comes into existence (*c*), and whether the whole or part of the purchase-money is unpaid (*d*), (though a receipt may have been given for it (*e*), and whether the consideration be a sum in gross or an annuity (*f*), or be payable by instalments (*g*). It binds not only the purchaser, his heir, and volunteers, but also persons having equitable interests, and purchasers who have acquired the legal estate with notice of the non-payment of the purchase-money and claiming under the original purchaser (*h*). And where the consideration is expressed to be paid in the deed, but is in fact wholly or partly left unpaid, parol evidence may be given on the part of the vendee of the real transaction, because it is the vendor himself who, by claiming a

(*t*) *Goode v. Burton*, 1 Ex. 189; *Esdale v. Oxenham*, 3 B. & C. 225, explained there.

(*u*) *Wrouth v. Dawes*, 4 Jur. (N.S.) 396.

(*x*) *Mackreth v. Symmons*, 15 Ves. 329.

(*y*) *Ewing v. Osbaldiston*, 2 Myl. & Cr. 53.

(*z*) *Winter v. Lord Anson*, 3 Russ. 488; *Matthew v. Bowler*, 6 Hare, 110; *Elliott v. Edwards*, 3 Bos. & P. 181.

(*a*) *Re Vulcan Ironworks Co.*, W. N. (1888) p. 37.

(*b*) *Davies v. Thomas*, [1900] 2 Ch. 462; *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67.

(*c*) *Rose v. Watson*, 10 H. L. C. 672; *Re Stucley, Stucley v. Kekewich*, *supra*.

(*d*) *Harrison v. Southcote*, 2 Ves. Sen. 393; *Austen v. Halsey*, 6 Ves. 475; *Elliott v. Edwards*, *supra*.

(*e*) *Saunders v. Leslie*, 2 Ba. & Be. 509.

(*f*) *Tardiff v. Scrughan*, cited 1 Bro. C. C. 423; *Richardson v. McCausland*, Beat. 457, explaining *Mackreth v. Symmons*, 15 Ves. 329; *Clarke v. Royle*, 3 Sim. 499; *Matthew v. Bowler*, 6 Hare, 110; Sugd. V. & P. 676, ed. 14.

(*g*) *Nives v. Nives*, 15 Ch. D. 649.

(*h*) *Elliott v. Edwards*, *supra*, and *Mackreth v. Symmons*, *supra*; *Gibbons v. Braddall*, 2 Eq. Ca. Abr. 682; *Walker v. Preswick*, 2 Ves. sen. 622; Belt's Sup. 449; *Cator v. Earl of Pembroke*, 1 Bro. C. C. 301.

Paragraphs
507—509

lien, is the first to set up an equity against the written statement in the deed (*i*). The lien extends to money advanced by the unpaid vendor to the purchaser for improvements (*k*).

Sales under
Lands Clauses
Acts.

The lien arises for the price payable for land taken by a public company either under the Lands Clauses Act or by agreement (*l*); and as well where the consideration is a rent-charge as where it is a gross sum (*m*) and also for the compensation for severance when it forms part of the purchase-money (*n*). But it does not extend to the costs of the statutory arbitration, although they be payable by the company (*o*); nor does it give the vendor a security for his costs upon the sum deposited by the company, under s. 85 of the Act, when the condition of the bond has been performed (*p*).

Sale of
superfluous
lands.

On the other hand, it is extremely doubtful whether a railway company which sells its superfluous lands, has any lien for the price (*q*).

Purchaser has
lien for
purchase-
money paid
on account or
prematurely.

508. Conversely, if purchase-money be paid prematurely, the purchaser or sub-purchaser will have a lien on the estate (*r*); and when the purchaser properly declines to complete, there is a lien for the deposit and interest on unpaid purchase-money, and for interest on the payments (*s*), and for his cost of a suit by himself or the vendor to compel performance of the contract (*t*). And so if the purchaser have resold before completion, the sub-purchaser will have a lien for what he has paid, upon the interest which the original purchaser has acquired by part payment of the purchase-money (*u*). After the completion of the purchase an evicted purchaser has no lien on the purchase-money, though it be earmarked, as against an assignee of the fund for valuable consideration without notice; but it seems to have been thought that his lien would have prevailed against the vendor (*x*).

Purchaser's
lien restricted
to estate and

509. The purchaser's lien, however, only exists absolutely where the vendor is owner in fee of the estate. Where he is a

(*i*) *Winter v. Lord Anson*, 1 Sim. & St. 434.

(*k*) *Exp. Linden*, 1 Mont. D. & De G. 428.

(*l*) *Walker v. Ware, etc. Rail. Co.*, L. R. 1 Eq. 195; *Bishop of Winchester v. Mid-Hants Rail. Co.*, L. R. 5 Eq. 17; *Wing v. Tottenham, etc. Rail. Co.*, L. R. 3 Ch. 740. For form of order in such cases, see *Marshall v. Scarborough, etc. Rail. Co.*, W. N. [1889] p. 73.

(*m*) *Eyton v. Denbigh, etc. Rail. Co.*, L. R. 7 Eq. 439.

(*n*) *Walker v. Ware, etc. Rail. Co.*, L. R. 1 Eq. 195.

(*o*) *Ferrers v. Stafford, etc. Rail. Co.*, L. R. 13 Eq. 524.

(*p*) *Exp. Stevens, Re London & South Western Rly.*, 2 Ph. 772; 13 Jur. 2; *Re Neath and Brecon Rail. Co.*, L. R. 9 Ch. 263.

(*q*) *Re Thackwray & Young*, 40 Ch. D. 34.

(*r*) *Per Sir Thomas CLARKE, M.R., Burgess v. Wheate*, 1 W. Bl. 150; and see cited 15 Ves. 345.

(*s*) *Rose v. Watson*, 10 Jur. (N.S.) 297; *Wythes v. Lee*, 3 Drew. 396, and see 25 L. J. Ch. 389; *Whitbread & Co., Limited v. Watt*, [1902] 1 Ch. 835.

(*t*) *Middleton v. Magnay*, 2 H. & M. 233; *Turner v. Marriott*, L. R. 3 Eq. 744.

(*u*) *Aberaman Ironworks v. Wickens*, L. R. 4 Ch. 101.

(*x*) *Cator v. Earl of Pembroke*, 1 Bro. C. C. 301; 2 Bro. C. C. 282.

mortgagee selling under a power of sale, it does not exist against the mortgagor, but only against the mortgagee to the extent of his interest in the estate. But it is said that if he be only a trustee it may affect the interests of his *cestuis que trust* (y). Paragraphs 509—513
interest of vendor.

510. The principle upon which a lien is raised in the case of purchaser, does not apply (z) where the vendors, being known by the purchaser to be trustees, the purchaser leaves part of the purchase-money in the hands of one of them under his absolute control, and without the concurrence of the co-trustees or the *cestuis que trust*. Purchaser has no lien for money paid knowingly to one of several trustee vendors.

511. The benefit of the lien may be transferred, even by parol, to a person in possession of the title deeds (a). Benefit of lien transferable.

SUB-SECTION (2).—Of Partnership Liens.

512. The separate share or interest of each of several partners, being only that which remains after the discharge of all liabilities to which the joint property is subject, and every assignment of or execution against the partnership estate, in respect of the private debt of any partner, being subject to those liabilities (b), it follows that, on the dissolution of the partnership by the death, bankruptcy, or retirement of a partner, the retiring partner, the assignees of the bankrupt, or the representatives of the deceased (and conversely, the solvent or continuing partners), have a lien at law, as well as in equity, on the partnership estate for the satisfaction of all demands arising out of the joint business prior to the dissolution (c) including purchase-money paid under a partnership agreement obtained by fraud (d); or for allowances or payments agreed to be made upon the dissolution (e) to the person claiming the lien. And if one partner draw a bill in the name of the firm to secure his separate debt, the separate estate of the other partner will have a lien against the share of the surplus of the joint estate, belonging to the drawer of the bill (f). Partner has liens on co-partner's share for latter's liabilities.

513. This lien, which holds good against the representatives and trustee in bankruptcy of the continuing partners (g), has been Foundation of partnership liens.

(y) *Wythes v. Lee*, *supra*.

(z) *White v. Wakefield*, 7 Sim. 401.

(a) *Dryden v. Frost*, 3 Myl. & Cr. 670. And see *White v. Wakefield*, 7 Sim. 401.

(b) *Taylor v. Fields*, 4 Ves. 396; *Kendall v. Hamilton*, 4 App. Cas. 504; *Badeley v. Consolidated Bank*, 38 Ch. D. 238.

(c) *West v. Skip*, 1 Ves. Sen. 239, 456; *Skipp v. Harwood*, 2 Swans. 586; *Exp. Williams*, 11 Ves. 3; *Harvey v. Crickett*, 5 Mau. & S. 336; per PARKE, B., in *Hague v. Dandison*, 2 Ex. 741; and see now Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 39.

(d) *Mycock v. Beatson*, 13 Ch. D. 384; *Binney v. Mutrie*, 12 App. Cas. 160, 165; and see now Partnership Act, 1890, s. 41.

(e) *Exp. Rowlandson*, 2 Ves. & B. 172.

(f) *Exp. King*, 17 Ves. 115.

(g) *Stocken v. Dawson*, 17 L. J. Ch. 282.

Paragraphs
513—516

distinguished (*h*) from the ordinary lien or mortgage upon stock in trade (401), on the ground that the latter binds the stock in trade through all its changes; not preventing the sale of old and the acquirement of new stock, but subsisting upon the constantly changing stock as it may exist from time to time: whereas the lien, which arises in partnership matters, is a right to the property in the thing itself, preventing the sale of the existing stock without the consent of the executors of the surviving partner, and not extending to stock subsequently purchased. This distinction, however, seems to be contrary to the view taken of the nature of the lien by Lord *Hardwicke*, the correctness of which appears to be well established: for he, also referring to the effect of a mortgage of stock and goods in trade, held in two cases (*i*), which arose out of the same transactions, that the lien of a partner on dissolution was not appropriated (*i.e.*, limited) to the stock brought in, but extended to every thing coming in lieu during the continuance or after the determination of the partnership.

Bonâ fide
sale to
purchaser
bars lien.

514. The lien is no longer available after the continuing partner has *bonâ fide* assigned the property to a purchaser for value (*k*). It has been said that the right of a retiring partner cannot be higher than if there had been in the continuing partner an express trust to sell and apply the proceeds in payment of the partnership debts, in which case the purchaser would not be bound to see to the application of the purchase-money. Upon this principle it seems that a *bonâ fide* sale at any time would bar the lien; but in the case cited (*l*) six years had elapsed since the dissolution, an interval after which a purchaser might reasonably suppose that all debts had been barred or paid.

After
dissolution
completed,
lien is
barred.

515. And even where, on a dissolution, the partnership property has been assigned (*m*) to the continuing partner, and he has undertaken to pay the debts and to indemnify the retiring partner against them, or the property has been specifically divided between the late partners (*n*), the lien is at an end.

Property to
which lien
extends.

516. The lien extends to mining property (*o*), and to all other real and personal estate which is vested in the partners, for the purposes of the partnership, as joint tenants; and therefore, to

(*h*) *Payne v. Hornby*, 25 Beav. 280.

(*i*) *Skipp v. Harwood*, 2 Swans. 586, 588; *West v. Skip*, 1 Ves. Sen. 239, 244; *Belt's Sup.* 130, 199; and see in *Pennell v. Deffell*, 4 De G. M. & G. at p. 388, observations of TURNER, L.J.

(*k*) *West v. Skip*, 1 Ves. Sen. 239; *Campbell v. Mullett*, 2 Swans. 551.

(*l*) *Re Langmead's Trusts*, 20 Beav. 20; affirmed on the same and other grounds, 7 De G. M. & G. 353.

(*m*) *Exp. Ruffin*, 6 Ves. 119; *Exp. Burdekin*, 2 Mont. D. & De G. 704.

(*n*) *Lingen v. Simpson*, 1 Sim. & St. 600.

(*o*) *Fereday v. Wightwick*, 1 Russ. & Myl. 45.

those joint purchases of real estate, in which, by reason of the advance of the price by the purchasers in unequal shares (*p*), or of expenditure of money by one of them in repairs or improvements (*q*), the transaction may be treated as in the nature of a partnership, (*i.e.*, in which a profitable return of the outlay is expected;) as distinguished from a mere joint occupation not of that character, though arising under a joint ownership (*r*), or a transaction in which there is not a joint adventure (*s*).

Paragraphs
516—518

517. But it does not arise as to property which is held in common by part owners. Upon a share in a ship (which is generally so held) there is, therefore, no lien in favour of the owners of the other shares in respect of advances for outfit and for their share of freight (*t*), though the shares of the freight or earnings are so liable, and cannot be claimed until payment of the due proportion of advances for outfit and expenses (*u*). Nor has a partnership firm any lien upon the separate interest in it of one of the partners, in respect of a debt not arising out of the partnership transaction (*x*). But in a *partition action* one tenant in common may be allowed expenditure which has benefited the others (*y*).

Does not
extend to
ownership in
common.

518. As it is only on the dissolution of the partnership that the equity arises against the partnership estate, no lien arises (*in the absence of a special contract*) to a company against the shares of a proprietor for a debt due from him to the company, where the shares are transferable like stock, subject only to the approval by the company of the transferee. For the transfer works no dissolution and the shareholder in such a case is considered as a stranger as to his borrowing from the company (*z*). An express stipulation in the deed of settlement, notice of which is endorsed on the share certificates, that the company shall have "a lien" on the shares of proprietors who are customers of and indebted to the company, and that the shares shall not be transferred without the consent of the directors, gives the company a charge which will prevail against the bankruptcy trustee of a shareholder possessed of the certificates, the directors being able to refuse their consent to the transfer (*a*);

Lien only
arises on
dissolution
unless by
express
contract, and
is then subject
to the claims
of *bonâ fide*
incum-
brancers
of whose
charges
notice has
been given.

(*p*) *Per* Lord HARDWICKE, in *Rigden v. Vallier*, 2 Ves. Sen. 256.

(*q*) *Lake v. Gibson*, 1 Eq. Ca. Abr. 291.

(*r*) *Kay v. Johnston*, 21 Beav. 536.

(*s*) *Exp. Gemmell*, 3 Mont. D. & De G. 198.

(*t*) *Exp. Young*, 2 Ves. & B. 242; *Exp. Harrison*, 2 Rose, 76.

(*u*) *Holderness v. Shackels*, 8 B. & C. 612; *Green v. Briggs*, 6 Hare, 395.

(*x*) *Per* Lord HARDWICKE, *Ryall v. Rowles*, 1 Ves. Sen. 374; *Meliorucchi v. Royal Exchange Assurance Co.*, 1 Eq. Ca. Abr. 8.

(*y*) *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461; *Re Cook's Mortgage, Lawledge v. Tyndall*, [1896] 1 Ch. 923.

(*z*) *Murray v. Pinkett*, 12 Cl. & F. 764; and see *Re Ystalyfera Gas Co.*, W. N. (1887) p. 30.

(*a*) *Exp. Plant*, 4 Deac. & C. 160. See also *Deering v. Hibernian Banking Co.*, 16 W. R. 578.

Paragraphs
518—520

though, where the shareholder has full power to transfer, the shares will pass to the trustee (*b*). In either case, where the shareholder has incumbered his shares, and the incumbrancer has given notice thereof to the company, the latter cannot claim priority under their charge for moneys accrued due to them from the shareholder after such notice (*c*). An agreement, which purports to give a lien to a company on the shares and stock of a shareholder, also gives a charge on the dividends (*d*).

Partnership
lien after
dissolution is
extended to
the creditors
by sub-
rogation.

519. The benefit of the lien is carried on to creditors of the partnership, who, although before the dissolution they have no lien at law or in equity against the partnership effects, nor any right but that of suing and taking out execution (*e*), are entitled after dissolution, by virtue of the equities between the partners themselves, and so long as those equities subsist (but by no other right), to obtain satisfaction of their claims out of the partnership estate (*f*). Where the dissolution has been caused by death, the assets of the deceased partner are equally liable with the estate of the survivor, and may be resorted to without regard to the state of the accounts (*g*) between the deceased and the surviving partners; and it is open to the creditor, if he think fit, to resort in the first instance to the deceased partner's assets, leaving his representatives to recover against the survivor (*h*).

The equity of the creditor, being only founded upon the partnership relation, was held not to arise against the estate of a deceased partner in respect of debts incurred by a surviving partner while carrying on the business and claiming to be absolute owner of the whole estate (of which he was afterwards held to be a trustee), and not under the authority of the representative of the deceased, who was never in the situation of a partner with the trustee (*i*).

SUB-SECTION (3).—*Of Liens for Expenditure upon the Property of another, and herein of Salvage Liens and Liens upon West India Estates.*

In general
no lien for
money paid
for another's
benefit.

520. As a general rule, there is no lien in favour of a person who has expended his money on property in which he has no interest, or for the benefit of another. The marine doctrine of

(*b*) *Nelson v. London Assurance Co.*, 2 Sim. & St. 292.

(*c*) *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

(*d*) *Hague v. Dandison*, 2 Ex. 741.

(*e*) *Per* Lord ELDON, *Exp. Ruffin*, 6 Ves. at p. 126.

(*f*) *Exp. Rowlandson*, 2 Ves. & B. 172; *Exp. Kendall*, 17 Ves. 514; *Stuart v. Ferguson*, Hayes, Ir. Ex. R. 452; *per* JOY, C.B., *Exp. Ruffin*, 6 Ves. 119; *Campbell v. Mullett*, 2 Swans. 551.

(*g*) *Per* Lord ELDON, *Vulliamy v. Noble*, 3 Mer. 593; *Devaynes v. Noble*, 2 Russ. & Myl. 495.

(*h*) *Wilkinson v. Henderson*, 1 Myl. & K. 582.

(*i*) *Stocken v. Dawson*, 17 L. J. Ch. 282.

salvage has no application to such cases (*k*). And even where he has an interest, it has been laid down (with respect to the payment of premiums upon life policies, which afford a good illustration of the general rule), that, independently of contract, a lien can only arise by reason of the right of trustees to an indemnity out of the trust estate for expenditure in its preservation, or by subrogation of the right to persons who have made the advance at their request; or by reason of the right of an incumbrancer on the property to add such expenditure to his charge (*l*). (524). It would seem, however, that these three exceptions are not exhaustive (*m*).

No such right, therefore, belongs to a tenant in common against the share of his co-tenant for payments in respect of the estate (*n*); nor to one joint owner for money lent to another (*o*), except it be in the nature of a partnership transaction (516); nor to a firm against property purchased by one of the partners and paid for out of partnership money (*p*); nor to a person who has laid out money on property which he has bought without a title (*q*); nor to a solicitor who has lent money in the name of his client, who is an executor, to pay off a debt on the testator's estate (*r*); nor to a guardian who has discharged an incumbrance on the infant's estate (*s*); nor in favour of a puisne mortgagee as against a first mortgagee (*t*).

521. But it is otherwise as to persons who have laid out money upon property under a mistaken belief that they are entitled to or interested in it; or on the faith of a contract for an interest therein. A lien has therefore been allowed (*u*) to a husband for purchase-money paid by him under the mistake that, in right of his wife he was entitled to the benefit of her contract for purchase,—in substitution for the vendor's lien which he discharged,—and also a lien for the cost of substantial improvements made under the same mistake. And a person who had laid out money upon property purchased from a remainderman, upon the faith of a representation that the tenant for life would concur in the sale, which he afterwards refused to do was allowed a lien for his expenditure (*x*). And in the case of an agreement for a lease providing that the tenant

Circumstances in which liens are allowed by reason of mistake, etc.

(*k*) *Falcke v. Scottish Imperial Insurance Co.*, 34 Ch. D. 234; *Murray v. Pinkett*, 12 Cl. and F. 764; *Burridge v. Row*, 1 Y. & Coll. C. C. at p. 191, per KNIGHT-BRUCE, V.-C., and 13 L. J. Ch. 173; *Clack v. Holland*, 19 Beav. at p. 277, per Lord ROMILLY.

(*l*) *Re Leslie, Leslie v. French*, 23 Ch. D. 552; *Clack v. Holland*, *supra*; and *Re Earl of Winchilsea's Policy Trusts*, 39 Ch. D. 168.

(*m*) *Per LINDLEY, L.J., Strutt v. Tippet*, 62 L. T. 475; and see also *Falcke v. Scottish Imperial Insurance Co.*, 34 Ch. D. 234.

(*n*) *Exp. Young*, 2 Ves. & B. 242, notwithstanding *Doddington v. Hallet*, 1 Ves. Sen. 497; *Exp. Harrison*, 2 Rose, 76; *Exp. Leslie*, 3 L. J. (N.S.) Bk. 4.

(*o*) *Kay v. Johnston*, 21 Beav. 536. (*s*) *Hooper v. Eyles*, 2 Vern. 480.

(*p*) *Walton v. Butler*, 29 Beav. 428. (*t*) *Re Powers Policies*, [1899] 1 Ir. R. 6.

(*q*) *Ridgway v. Roberts*, 4 Hare, 106. (*u*) *Neesom v. Clarkson*, 4 Hare, 97.

(*r*) *Christian v. Field*, 2 Hare, 177. (*x*) *Ludlow v. Grayall*, 11 Price, 58.

Paragraphs
521—524

should improve and *should be repaid* in case the lease was not granted, the tenant had a lien for his expenditure on the interest of the person with whom he made the agreement (*y*). But if money be expended on improvements in consideration of the granting of a lease at an additional rent, the *tenant or his assignees, rejecting the lease*, cannot claim a lien for the expenditure (*z*).

If the personal estate of a lunatic have been applied in discharge of a mortgage upon his real estate, a lien upon the latter will be allowed to his next of kin; because the nature of a lunatic's estate cannot be changed as between his real and personal representatives (*a*).

Lien arises where owner has allowed expenditure by person who expects to reap the benefit.

522. A lien is also given for expenditure upon property, where the owner has allowed the person who has laid out the money to do so in the expectation that he will receive the benefit of it. As where a father allowed his sons the use of land without any agreement as to the terms of the occupation, and they expended large sums in building, and also supplied the father with goods in respect of his outlay in building before their occupation, a lien was allowed both for their own expenditure and for the value of the goods (*b*).

Here the value of the land was small compared with the outlay, and the latter was far more than a reasonable compensation for the value of the occupation. But where these conditions were reversed, (as where a father allowed his son-in-law to live in his house rent free for many years), the latter was denied a lien for his outlay in repairs, and for the renewal of a small part of the building; and it was said that in such a case there was an implied contract to keep the premises in repair, and that the extraordinary expenditure incurred was not of itself enough to support the claim (*c*).

No lien in favour of party who has not fulfilled his bargain.

523. A person who has agreed to advance money for the purposes of an undertaking, has no lien for his advances unless he has entirely fulfilled his agreement: and he cannot claim a share of the profits proportioned to his advance (*d*). And a statement in the prospectus of a company, that deposits will be returned if no allotment of shares be made, will not create a lien in respect of deposits paid to the credit of the company (*e*).

Salvage liens in favour of fiduciary persons, joint-tenants,

524. A lien is also allowed in respect of advances in the nature of salvage (**1169**), by incumbrancers and trustees, and even in some cases by creditors, joint tenants, and tenants for life. Thus, such liens have been allowed for payments made for the redemption of property, for renewal fines, or other payments made by way

(*y*) *Middleton v. Magnay*, 2 H. & M. 233. (*z*) *Exp. Ladd*, 3 Deac. & C. 647.

(*a*) *Weld v. Tew*, Beat. 266. (*b*) *Unity Joint Stock Mutual Banking Association v. King*, 25 Beav. 72. (*c*) *Millard v. Harvey*, 10 Jur. (N.S.) 1167.

(*d*) *Twynnam v. Hudson*, 8 Jur. (N.S.) 685; *Wallis v. Smith*, 21 Ch. D. 243.

(*e*) *Moseley v. Cressey's Co.*, L. R. 1 Eq. 405.

of salvage ; and whether he who paid the money filled the character of a trustee, joint tenant, tenant for life, or mortgage or other creditor, and even though (in the case of a creditor) his debt was disputed (*f*). But it seems questionable whether, having regard to the decision of the Court of Appeal in *Re Leslie, Leslie v. French*, *supra*, such liens would be now recognised except in the case of trustees and incumbrancers, and those claiming through them by subrogation. It would seem, however, to be clear that a tenant for life or other limited owner has such a lien, whether the trustees of the settlement could or could not have raised the money by other means (*g*). A married woman who, out of her separate estate, has paid the premiums on policies effected as a provision under her marriage settlement, is also entitled to such a lien (*h*). And so is the assignee of a policy, for premiums paid after the assignment, with interest from the dates of the several payments, as against persons who have established a prior interest in the policy (*i*). But the trustee of a policy who makes or obtains such advances can neither obtain nor create such a lien, if he be, or in the due performance of his trust ought to be, in possession of funds applicable for the purpose (*k*).

Paragraphs
524—525
creditors,
and others.

Although the mortgagor himself cannot, as a general rule, claim repayment of money laid out by him in the improvement or preservation of the security (*l*), his representative has been held entitled to the repayment of premiums, which he had paid after his liability to do so had been determined by his bankruptcy (*m*) ; *sed quære*.

525. Another class of equitable salvage liens arises in connection with certain undertakings, such as mines and alum works, Salvage liens in favour of managers of

(*f*) *Manlove v. Bale*, 2 Vern. 84 ; *Lacon v. Mertins*, 3 Atk. 4 ; *Hamilton v. Denny*, 1 Ba. & Be. 199 ; *Jones v. Jones*, 5 Hare, 440 ; *Fetherstone v. Mitchell*, 9 Ir. Eq. Rep. 480. See, however, observations in *Re Leslie, Leslie v. French*, 23 Ch. D. at p. 564.

(*g*) *Todd v. Moorhouse*, L. R. 19 Eq. 69.

(*h*) *Burridge v. Row*, 13 L. J. Ch. 173.

(*i*) *West v. Reid*, 2 Hare, 249 ; *Gill v. Downing*, L. R. 17 Eq. 316.

(*k*) *Clack v. Holland*, 19 Beav. 262. See *Exp. Grissell*, 3 Ch. D. 411, on construction of an agreement.

(*l*) *Norris v. Caledonian Insurance Co.*, L. R. 8 Eq. 127 ; *Saunders v. Dunman*, 7 Ch. D. 825.

(*m*) *Shearman v. British Empire Mutual Life Assurance Co.*, L. R. 14 Eq. 4. In *Saunders v. Dunman*, 7 Ch. D. at p. 825, it was doubted by FRY, J., whether the M.R. meant to determine the question as stated above, and it is remarked that the question for argument related to the right to the entirety of the fund, that the case as to the premiums was decided on the ground that an offer had been made to give the defendant the portion of the fund which represented the actual payment, and that the offer had not been withdrawn. But the cases cited show that the question of salvage was argued ; the offer was of a larger sum than the premiums and the interest on them. And the M.R. laid down that the premiums paid after the bankruptcy were in the nature of salvage moneys.

Paragraphs
525—526

dangerous or
speculative
under-
takings.

by reason of the exigencies of which, and of the perishable nature of the works by which they are carried on, a lien is allowed to the manager, whether he be one of several part owners or otherwise, for the expenses incurred and the advances made in the working of them (*n*). Of this nature is the cultivation of West India estates, which cannot be carried on without the assistance of consignees and agents at home, and but seldom without pecuniary or other supplies; for which therefore, whether for the immediate purposes of the estate (*o*), or for the interest of incumbrances (*p*), a lien is allowed upon the estate independently of the lien which may arise from any particular course of dealing between the parties (*q*); provided the lien be not excluded by a contract which expressly defines and limits the nature and extent of the consignee's security (1790) (*r*).

The right is allowed as well to the manager of the estate abroad, where duly authorized, as to the consignee at home of the produce (*s*); and it will arise in favour of a manager, whether he be appointed by the owner or trustee of the estate, or by the Court of Chancery (*t*). Where the appointment is made by the court, in a suit properly constituted, it is made on behalf of all the parties interested; and the manager is entitled to his commission and allowances, and to a lien for the balance due to him, if not as manager, yet as the officer of the court, entitled to be repaid all advances and all expenses incurred in executing the trust under its authority (*u*).

Neither
owner nor
(in general)
manager of
incumbered
estate has
lien for
expenditure.

526. No lien arises in favour of the owner of an incumbered estate, because it is presumed that he makes the advances for his own benefit in respect of the equity of redemption (*x*). And where the owner of an estate, subject to charges, has appointed a manager, no lien arises by virtue only of that appointment against the incumbrancers, whose title is prior to that of the owner, and

(*n*) *Per* Lord ELDON, in *Scott v. Nesbitt*, 14 Ves. 438; *Sayers v. Whitfield*, 1 Knapp. P. C. 133. Compare this right with the rights of incumbrancers, under charges made by managers of infants' estates by Hindoo law, *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonverree*, 6 Moo. I. App. 393.

(*o*) *Scott v. Nesbitt*, 14 Ves. 438; *Fraser v. Burgess*, 13 Moo. P. C. 314; *Sayers v. Whitfield*, 1 Knapp, P. C. 133. Limited liens subsist by enactment in some of the West India Islands, see BURGE, Col. Law, 3, 359; and see *Scott v. Nesbitt*, 14 Ves. at p. 441.

(*p*) *Re Greathead*, Cust's West Indian Incumbered Estates Acts, 219, ed. 2.

(*q*) See *Simond v. Hibbert*, 1 Russ. & Myl. 719.

(*r*) *Re Leith's Estate*, *Chambers v. Davidson*, L. R. 1 P. C. 296.

(*s*) *Fraser v. Burgess*, *supra*; *Bertrand v. Davies*, 31 Beav. 429.

(*t*) *Scott v. Nesbitt*, *supra*; *Bertrand v. Davies*, *supra*; *Daniel v. Trotman*, 1 Moo. P. C. (N.S.) 123; *Fraser v. Burgess*, *supra*, *per* Lord Kingsdown.

(*u*) *Morison v. Morison*, 7 De G. M. & G. 214; *Fraser v. Burgess*, *supra*; *Farquharson v. Balfour*, 8 Sim. 210.

(*x*) *Re Greathead*, Cust's West Indian Incumbered Estates Acts, at p. 235, ed. 2.

who have nothing to do with the expenditure. But if the incumbancers, or other persons interested, have so recognized the possession of the manager, that he can be considered as acting on their behalf and for their benefit, the same consequences will follow as if he had been appointed by the court; and they will not be allowed to dispute a lien for expenditure, which by their tacit acquiescence he has been encouraged to make (*y*). If, however, a mortgagee, not being in possession, be not a party to a suit in which the manager is appointed, or if he allow the mortgagor to manage the estate and receive the produce, he will not be bound by the previous management (*z*). He cannot have an account of the past produce, and is not bound by the costs of management subsequent to the mortgage (1721).

Paragraphs
526—527

527. The lien of the manager, only affects the interest of the person who appoints him; and after notice from the remainderman, the manager can only hold as mortgagee in possession under his existing lien, or adversely to the owner; in which case he cannot claim a lien for the expenses of management. But a lien will arise in respect of supplies made for the use of the crops which were produced next after the death of the tenant for life (*a*). And a tenant for life himself has a lien upon the inheritance for necessities supplied (*b*).

How far a
manager's lien
affects
remainder-
men.

If the estate be managed by the court, the consignee's or manager's claim will be admitted against every fund arising therefrom, which is under the control of the court; whether the fund was realized before or after the discharge of the consignee, and although it was realized before the mortgagee was made party to the suit; the mortgagee's interest having been the same throughout, and the expense of keeping up the estate being a liability to which he was always subject, and which he cannot evade by leaving the management to the court (*c*).

But the consignee's claim against the corpus is admitted only on the final settlement of accounts upon his discharge, and pending the consigneeship he cannot come to the court whenever a balance is due to him for payment out of the estate (*d*).

If he require payment when his discharge has not been already ordered, he must therefore pray that he may be discharged and may pass his final accounts, and that so much as is necessary of the

(*y*) *Fraser v. Burgess*, *supra*; *Bertrand v. Davies*, 31 Beav. 429; *Morison v. Morison*, 7 De G. M. & G. 214.

(*z*) *Bertrand v. Davies*, *supra*.

(*a*) *Ibid*.

(*b*) *Per Lord ELDON*, *Scott v. Nesbitt*, 14 Ves. at p. 442.

(*c*) *Morison v. Morison*, 7 De G. M. & G. 214; *Lyne v. Thompson*, 30 Beav. 542; *Re Tharp*, 2 Sm. & G. 578n.

(*d*) *Farquharson v. Balfour*, 8 Sim. 210.

Paragraphs
527—531

fund in court, representing the corpus, may be paid him in a discharge of the balance to be found due, and for his costs : and for the purpose of thus praying for his discharge, he may be allowed to amend his petition (e).

To what a
consignee's
claim
extends.

528. The lien extends to all payments made by the consignee on account of charges on the estate, or under the orders of the court (f). Interest at 4l. per cent. will be allowed as compensation for the delay in payment (g) ; and in the absence of *malâ fides* the lien will not be affected by the injudicious or wasteful management of the manager appointed by the consignee (h).

Where-
consignee is
also an
express
trustee of
estate.

529. It has been held that a trustee of the estate who has acted as consignee, may enjoy a lien for his advances ; but it seems that he cannot for commission (i).

Insurer's
lien.

530. Persons who have paid money in discharge of insurances upon property which has been destroyed or injured, have also a lien upon whatever is received by the owner in the form of salvage. The money received by the owner of a damaged ship, from the person responsible for the damage, is therefore liable to the insurer for what he has paid under his insurance ; and the lien is extended in favour of the insurers of ships captured by an enemy, to such as are taken by their owners by way of reprisal ; and to money paid to the owners by the Crown under a commission for the distribution of prizes (k).

SUB-SECTION (4).—Of the Liens of Trustees for Costs Charges and Expenses.

General lien
of trustees
for costs,
charges and
expenses.

531. A trustee has a lien on the trust estate for money properly expended thereon (l) ; and where the director of a company made advances to complete a purchase and for other proper purposes of the company, the lien was allowed (m), although the conveyance recited that the payment was made with money belonging to the company. But the trustees can have no lien for costs or expenditure incurred in breach of their trust, as against the shares of those of their *cestui que trust* who have not actively induced them to commit the breach of trust, or (except by order of the Court under sect. 45 of the Trustee Act, 1893) whose interest in their shares is inalienable (n).

(e) *Morison v. Morison*, 7 De G. M. & G. 214.

(f) *Shaw v. Simpson*, 1 Y. & Coll. C. C. 732.

(g) *Morison v. Morison*, *supra*.

(h) *Re Harriott, Exp. Pengelley*, Cust's West Indian Incumbered Estates Acts, 271, ed. 2, and 8 L. T. (N.S.) 854.

(i) *Re Harriott, Exp. Pengelley*, *supra*.

(k) *White v. Dobinson*, 14 Sim. 273 ; *Randal v. Cockran*, 1 Ves. Sen. 98 ; *Blaauwpot v. Da Costa*, 1 Ed. 130.

(l) *Darke v. Williamson*, 25 Beav. 622 ; and see also *Stanier v. Evans*, 34 Ch. D. 470, and *Budgett v. Budgett*, [1895] 1 Ch. 202 (solicitor's lien).

(m) *Re Imperial Salt and Alkali Co.*, 2 W. R. 122.

(n) *Leedham v. Chawner*, 4 K. & J. 458.

Where all parties are ordered to be paid their costs out of a fund, an executor is not deprived of his lien by complying with an order to pay the fund into court (o). Paragraphs 531—533

532. A trustee who *successfully* defends an action brought for the purpose of avoiding a settlement, is entitled to his costs of the action out of the trust estate notwithstanding that by reason of the voluntary settlor becoming bankrupt within two years of the date of the settlement that instrument becomes void as against the settlor's creditors (p). Where however a trustee unsuccessfully defends an action brought for the purpose of avoiding a settlement (*ex. gr.* under 13 Eliz. c. 5) he must bear his own costs (q). How far trustee of void settlement entitled to costs of defending it.

533. For the security of the trust fund itself, if the trustee permit the *cestui que trust* to receive and apply it in the purchase of other property, or if he advances it to him for the purpose of investment (r), or if it be improperly invested (s), a lien will also arise. So if part of the trust fund be advanced to the *cestui que trust*, the advance may be set off in accounting for his share (t). And if a trustee or executor waste, or be indebted to the testator's estate, there will be a lien against his interest under the will in preference to the right of his mortgagee (u). And, generally, where money subject to trusts is applied in the purchase or improvement of property, into which it can be traced by sufficient evidence, there will be a lien for it upon that property (x). The equity will therefore arise where a husband having acquired possession of settled property upon his undertaking to lay it out according to the trusts (y), or of the wife's separate estate (z), with the intention or under a promise to invest it for her benefit, has applied it in a purchase in his own name. And where the fund was held upon trust for the husband and wife during their joint lives, and for the survivor absolutely, money expended by the husband shortly after the marriage, was assumed, under the circumstances, to have been taken from the capital of the fund, and the wife surviving was held to have a lien for the amount (a). Trustee has lien on all property into which trust property converted.

(o) *Blenkinsop v. Foster*, 3 Y. & C. 207.

(p) *Re Holden, Exp. Official Receiver*, 20 Q. B. D. 43.

(q) *Exp. Russell, Re Butterworth*, 19 Ch. D. at p. 602; *Re Holden, Exp. Official Receiver*, *supra*.

(r) *Price v. Blakemore*, 6 Beav. 507; *Birds v. Askey*, (No. 2), 24 Beav. 618.

(s) *Mant v. Leith*, 15 Beav. 524.

(t) *Exp. Makins*, 2 Mont. D. & De G. 508.

(u) *Morris v. Livie*, 1 Y. & Coll. C. C. 380; *Cole v. Muddle*, 10 Hare, 186; *Barnett v. Sheffield*, 1 De G. M. & G. 371. And see also *Douse v. Gorton*, [1891] A. C. 190.

(x) *Lane v. Dighton*, Ambl. 409; *Williams v. Thomas*, 2 Dr. & Sm. 29; *Harford v. Lloyd*, 20 Beav. 310; *Phayre v. Peree*, 3 Dow, 116.

(y) *Lane v. Dighton*, *supra*; *Att.-Gen. v. Whorwood*, 1 Ves. Sen. 534; *Wilson v. Foreman*, cited and explained, 10 Ves. 519.

(z) *Darkin v. Darkin*, 17 Beav. 579; *Scales v. Baker*, 28 Beav. 91.

(a) *Williams v. Thomas*, 2 Dr. & Sm. 29.

Paragraphs
534—536

Same
principle
applies to
constructive
trusts.

534. The lien may arise in the simple case where one person has laid out the money of another in a purchase, as well as where the purchaser is a properly constituted trustee (b). But against no person who becomes possessed of the fund will any equity exist unless it can be shewn that the money invested was the actual fund which is subject to the trust; for otherwise there is no room for the presumption (c), upon which the relief is granted, that the purchase was made in the execution of the trust. The advance must also have been of such a kind that the trust does not cease with it. Trust money advanced to an infant in the *bonâ fide* exercise of a power of advancement cannot be followed, though it be not applied to the purpose for which the advance was intended (d).

Improper
investment
of trust funds
creates lien
on the
investment.

535. The effect of the investment in real estate, of personalty which is subject to a trust, is to create a lien on the estate for the amount invested; and if the money be clearly shown to have been applied in the purchase, it is not material that it was applied indirectly; as in the repayment of money borrowed for the immediate purchase-money (e). The purchased estate cannot be claimed as belonging to the trust, but the lien may prevail to that extent also, if it be shown that there was an intention between the persons interested, that the property purchased should be substituted for the money (f).

Liens on the
shares of
beneficiaries
for sums due
to trust
estate.

536. The lien may also be fixed upon the beneficial interest of the person who has received the fund, in other property which is subject to the jurisdiction of the court.

Thus the trustees of a will, who had wrongly paid over trust moneys, were held (g) entitled to a lien for it, against the interest of the recipients in other property which was subject to the trusts, even as against assignees for valuable consideration. And where a married woman, entitled to a life interest in stock under one settlement, and to a life rent-charge on real estate under another, fraudulently appropriated the stock, the rent-charge was held liable to make it good as against an assignee with notice of the fraud (h). And property which a husband had acquired *jure mariti* has been

(b) *Ryall v. Ryall*, Ambl. 413; *Balgney v. Hamilton*, cited Ambl. 414.

(c) *Perry v. Phelps*, 4 Ves. 107. It seems to have been on account of the want of room for this presumption, that where a tenant for life by fraud procured a fine to be levied, and sold and made investments which could be identified, no specific lien was held to arise on the investments. The reason given is, that no agreement had been made so as to make this particular fund answerable. A general charge was, however, allowed against the estate of the tenant for life. (*Newcomb v. Burdon*, 2 Anst. 343.)

(d) *Lawrie v. Bankes*, 4 Jur. (N.S.) 299.

(e) *Lewis v. Madocks*, 8 Ves. 150; *Williams v. Thomas*, 2 Dr. & Sm. 29; *Hopper v. Conyers*, L. R. 2 Eq. 549.

(f) *Wadham v. Rigg*, 10 W. R. 365.

(g) *Dibbs v. Goren*, 11 Beav. 483.

(h) *Woodyatt v. Gresley*, 8 Sim. 180; and see *Priddy v. Rose*, 3 Mer. 86.

held liable to make good that which he had agreed to settle, but had taken and lost (*i*).

Paragraphs
536—538

But no such claim can be supported against property which, under a legal devise, has passed directly from a testator to the person in default (*k*); or where the property has in effect been excepted from the trusts to which the misappropriated funds were subject (*l*); or in case a mere debt has arisen, as where the defaulter only holds the legal estate upon trust for himself and another to whom he has not paid his share of the rent (*m*).

537. If mortgagors, empowered to raise money for a special purpose, apply it in excess of their power, in the discharge of prior mortgages upon the same *and other* property, the sum so misapplied is considered as trust money in the hands of the mortgagors, applicable specifically to the payment of the mortgage debts created under the power; and there is a lien on the property which was subject to the paid-off mortgages for the amount applied (*n*).

Misapplication of moneys received under powers.

538. For money or other property intrusted to a factor or broker for a special purpose, there is also a lien in the nature of a trust, in favour of the person by whom it was delivered or paid, as a corollary of the rule that the person intrusted therewith for the special purpose has no lien thereon; and this equitable right is fully recognized by courts of law, independently of any actual possession of the fund. Hence, if goods be intrusted to a factor for sale, and at the time of his death or bankruptcy they remain in specie; or having been sold, the proceeds have either not been received by the factor, or have been employed in the purchase of other goods or re-invested, and the investments or goods can be identified as the produce of that particular money, the principal is entitled; and if not already in possession, may enforce his right either at law or in equity (*o*).

Lien in favour of a customer on property, or the proceeds of property intrusted by him to broker or factor.

And bills in the hands of a banker, are like goods in those of a factor: if deposited for a special purpose with the banker or his agent, either before or after, but without notice of the bankruptcy, the property of the original owner is not divested; and if the banker's assignees allow the agent to retain such bills in satisfaction of his own lien, they, having received the same advantage as if the agent had remitted the amount, must make it good to the depositor (*p*).

(*i*) *Hastie v. Hastie*, 2 Ch. D. 304.

(*k*) *Fox v. Buckley*, 3 Ch. D. 508.

(*l*) *Hallett v. Hallett*, 13 Ch. D. 232.

(*m*) *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567.

(*n*) *Trevilian v. Mayor of Exeter*, 18 Jur. 1019.

(*o*) *Whitecomb v. Jacob*, 1 Salk. 160; *Scott v. Surman*, Willes, 404; *Exp. Sayers*, 5 Ves. 169; *Taylor v. Plumer*, 3 Mau. & S. 562; *Hassall v. Smithers*, 12 Ves. 119; *Giles v. Perkins*, 9 East, 12.

(*p*) *Exp. Cunningham*, 3 Deac. & C. 58.

Paragraphs
538—541

But if a person intrusted with the money or other property of another (*q*), has mixed it with his other assets, so that it not only cannot be distinguished, but cannot be so ascertained that it may be followed in equity, the right of the true owner to the specific sum as against the person intrusted ceases (*r*). So if bills deposited, being indorsed, have been negotiated (*s*) without notice of the title of the true owner, the right of the consignor of the goods or of the depositor of the bills is at an end, and he has no claim against the person by whom the possession has been acquired; the possession and property under such circumstances being inseparable. If by the indorsement the bills be made payable to the agent for the account of the principal, it will be sufficient notice of the principal's title (*t*).

SUB-SECTION (5).—*Of Liens in Cases of Misappropriation and Waste.*

Lien on deeds wrongfully abstracted by equitable mortgagor.

539. Where a debtor deposits deeds as security for his debt, and afterwards (having access to the place of deposit), he withdraws them without the consent of the creditor, the latter has a lien on the deeds belonging to the debtor at the time of the deposit. And it is immaterial whether the deeds were left in the debtor's custody as the solicitor of the creditor or otherwise, or whether the abstraction of the deeds was accidental or improper (*u*).

Lien on profits of estate for waste.

540. Where an estate has been wasted by a person who has but a limited interest in it, a lien arises for the amount of the injury against the profits received in his time in favour of the remainderman; and this is so even against the incumbrancers of the person who committed the waste, though claiming under securities made before it was committed (*x*).

SUB-SECTION (6).—*Of the Lien of Solicitors upon the Fruits of Judgments, apart from Statute.*

Solicitors have a particular lien for costs on fruits of judgments.

541. By a practice, which was said by Lord *Mansfield* (*y*) to be not very ancient, solicitors are entitled, both at law and in equity, not only to a general lien for their charges upon documents in their hands belonging to their clients, but also to a particular lien (*z*)

(*q*) *Scott v. Surman*, Willes, 404; *Whitecomb v. Jacob*, 1 Salk. 160.

(*r*) *Re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696, following *Dickson v. Murray*, 57 L. T. 223; notwithstanding *Re West of England, etc. Bank, Exp. Dale*, 11 Ch. D. 772.

(*s*) *Bolton v. Puller*, 1 Bos. & P. 546; *Collins v. Martin*, 1 Bos. & P. 648.

(*t*) *Treuttel v. Barandon*, 8 Taunt. 100.

(*u*) *Mason v. Morley*, 11 Jur. (N.S.) 459.

(*x*) *Briggs v. Earl of Oxford*, 1 Jur. (N.S.) 817.

(*y*) In *Wilkins v. Carmichael*, 1 Dougl. 101.

(*z*) *Welsh v. Hole*, 1 Dougl. 238; *Mackenzie v. Mackintosh*, 64 L. T. 318.

upon the fruits of a judgment or decree obtained by the client in the suit in which the solicitor was employed, for his costs in that suit. The former of these rights, depending upon the actual possession of the documents, will be considered in that part of the subject which relates to possessory liens (631); the latter, purely of an equitable character, though always recognized and enforced as fully at law as in equity, is now to be treated of as a lien not depending upon possession.

Paragraphs
541—546

542. A solicitor is entitled to a lien upon the interest of his client in a fund which has been recovered or protected by his exertions, for the costs incurred. This lien is applicable not only to money which he recovers by virtue of an adverse judgment (a), but also to money awarded to the client by an arbitrator, or payable to him under a compromise, and to the property dealt with under the decree in an ordinary administration suit, though it should turn out that the client himself takes no interest in the property (b).

Lien extends to awards of arbitrators and to compromises.

543. But whether by judgment or by compromise, the fund must have been secured by the diligence of the solicitor, who, therefore, cannot claim, by virtue of it, the costs of a former solicitor in the cause which he has paid (c).

Lien restricted to solicitor's own charges.

544. In equity, where a decree is as much for the benefit of the defendant as of the plaintiff, the solicitor of the former, as well as of the latter, enjoys the lien (d).

Solicitors of both parties may have lien.

545. It extends only to the costs of the particular matter, or of a matter immediately connected therewith (e); but where an action was brought at law, and the defendant commenced a suit in equity to assist his defence, in which he was ordered to pay a sum of money to the plaintiff at law, the fund was considered to have been recovered by means of the original action, and the attorney of the plaintiff at law was held entitled to the lien (f).

Is a particular lien.

546. As to funds not administered in court, the solicitor employed by a trustee has no lien upon the trust fund, though the trustee himself may retain his costs (g). But he generally has a limited lien upon his client's money actually in his hands (h); and

How far lien extends to money in the hands of the solicitor.

(a) *Ormerod v. Tate*, 1 East, 464; *Cowell v. Betteley*, 4 Moo. & Sc. 265; *Davies v. Lowndes*, 3 C. B. 808; *Verity v. Wylde*, 4 Drew. 427.

(b) *Lloyd v. Mason*, 4 Hare, 132; *Bailey v. Birchall*, 2 H. & M. 371; the latter case under 23 & 24 Vict. c. 127 (227).

(c) *Irving v. Viana*, 2 Y. & J. 70; and see *Townsend v. Reade*, 4 L. J. (N.S.) Ch. 233.

(d) *Townsend v. Reade*, *supra*.

(e) *Bozon v. Bolland*, 4 Myl. & Cr. 354; *Lann v. Church*, 4 Mad. 391; *Hall v. Laver*, 1 Hare, 571; per Lord LANGDALE, in *Lucas v. Peacock*, 9 Beav. 177; see *Stephens v. Weston*, 3 B. & C. 535; *Mackenzie v. Mackintosh*, 64 L. T. 318.

(f) *Simpson v. Prothero*, 3 Jur. (N.S.) 711.

(g) *Worrall v. Harford*, 8 Ves. 4.

(h) *Miller v. Ailee*, 3 Ex. 799.

Paragraphs
546—548

upon money which has been placed in his hands to abide the event of a litigation, when his client has established his right to it (*i*). And this lien extends to the solicitor of a married woman in a matrimonial suit, who has a lien upon moneys received by him on her account in the course of the suit, including alimony when she has allowed it to be received by the solicitor, to whom by the practice of the court it cannot be paid without her consent in writing (*k*).

The lien is paramount to claims of client's trustee in bankruptcy or administrator. Client cannot relieve adversary from costs.

547. The lien of the solicitor, being founded upon his equitable right against those who have the benefit of the fund which has been produced by his exertions, binds the trustee in bankruptcy of the client, whether the action was brought before the bankruptcy, or by the uncertificated bankrupt after it (*l*). And if money be recovered by an administrator, it is bound by the lien, and he cannot controvert it by insisting upon applying the assets in a course of administration (*m*); nor can the benefit of an order for payment of costs to the client be released by him to the prejudice of the lien of his solicitor (*n*).

How lien enforced.

548. The right of the solicitor (*o*) entitled to the lien is, that the fund recovered shall not be paid to the client until the costs have been discharged. The right may be enforced by action, or may be protected by a stop order, where the fund has been paid into court (*p*), and the lien will attach by means of an order that the costs shall be paid out of it (*q*); or the solicitor may retain his costs out of the fund, if it be already in his hands (*r*). The lien takes precedence of a charging order on the judgment obtained by a creditor of the client (*s*). It may also be enforced by an order of court for payment of the costs, by the person who becomes liable under the judgment (*t*). Where an order is made for payment of costs to the client, the solicitor is entitled to immediate payment out of the client's money in court, or out of the fruits of an execution in the hands of the sheriff, though the latter have notice to retain the fund, on the ground that the defendant intends to set aside the proceedings for irregularity (*u*).

(*i*) *Hanson v. Reece*, 3 Jur. (N.S.) 1204.

(*k*) *Exp. Bremner*, L. R. 1 P. & M. 254.

(*l*) *Jones v. Turnbull*, 2 Mee. & W. 601; *Exp. Bowden*, *Exp. Bush*, 2 Deac. & C. 182.

(*m*) *Turwin v. Gibson*, 3 Atk. 720.

(*n*) *Exp. Bryant*, 2 Rose, 237.

(*o*) See *Barker v. St. Quintin*, 12 Mee. & W. 441; *per PARKE, B., Verity v. Wylde*, 4 Drew. 427; *Exp. Games*, 3 H. & C. 294.

(*p*) *Sympton v. Prothero*, 3 Jur. (N.S.) 711; *Hobson v. Shearwood*, 8 Beav. 486. and note there.

(*q*) *Lord v. Colvin*, 2 Dr. & Sm. 82.

(*r*) *Hanson v. Reece*, 3 Jur. (N.S.) 1204.

(*s*) *Cormick v. Ronayne*, 22 L. R. Ir. 140; *Dallow v. Garrold*, 14 Q. B. D. 543.

(*t*) *Ormerod v. Tate*, 1 East, 464.

(*u*) *Pounset v. Humphreys*, C. P. Cooper, 142 *Griffin v. Eyles*, 1 H. Bl. 122.

549. This lien will not prevent the parties to a litigation from making a compromise, though the solicitor have given notice of his claim, and whether the damages sought to be recovered are unliquidated (*x*), or the result of the proceedings doubtful (*y*); or where the damages are liquidated, unless it be shown that the arrangement was made collusively to deprive the solicitor of his costs (*z*). The rule is followed even where the plaintiff sues *in formâ pauperis* (*a*). But if collusion be shown, the court will not allow a release given by a pauper plaintiff to be pleaded, but will order it to be taken off the file (*b*). The solicitor, after the action has been *bonâ fide* settled without his intervention, or on his acceptance of an undertaking for the payment of his costs, cannot proceed with the suit for the mere purpose of recovering them (*c*).

Paragraphs
549—550

Lien does not prevent parties compromising litigation.

550. Even if the person liable to pay the money should pay it to the client collusively, without regard to a notice (*d*) from the solicitor not to do so, or should otherwise by collusion attempt to deprive the solicitor of his costs, the latter has no right to proceed to execution in the suit contrary to the plaintiff's order, for the purpose of securing a fund out of which the costs may be paid (*e*). The proper remedy of the solicitor, in such a case, is to apply to the equitable jurisdiction of the court in which the action was brought, and which may make an order against both plaintiff and defendant, for repayment of the costs to the extent of the lien (*f*). Or the solicitor may proceed to recover his costs against the person who has paid the money under the collusive arrangement (*g*); or if a security have been given for the amount, it may be ordered to be delivered to the solicitor, that he may take his costs and hold the balance for the person entitled (*h*).

Collusion between plaintiff and defendant.

But the solicitor must be able to show that everything has been

(*x*) *Exp. Hart*, 1 B. & Ad. 660.

(*y*) *Exp. Morrison*, L. R. 4 Q. B. 153.

(*z*) *Clark v. Smith*, 6 Man. & Gr. 1051; *Brunsdon v. Allard*, 2 El. & El. 19; *The Hope*, 8 P. D. 144.

(*a*) *Francis v. Webb*, 7 C. B. 736.

(*b*) *Wright v. Burroughes*, 3 C. B. 344.

(*c*) *Chapman v. Haw*, 1 Taunt. 341; *Morse v. Cooke*, 13 Price, 473.

(*d*) But if a person who holds a fund for those entitled states that he cannot attend to a notice unless prevented from paying it over by legal process, the attorney must not rest upon his notice, but must take proceedings to secure the fund. (*Townsend v. Reade*, 4 L. J. (N.S.) Ch. 233.)

(*e*) *Exp. Games*, 3 H. & C. 294; and see *Martin v. Francis*, 2 B. & Ald. 402; *Marr v. Smith*, 4 B. & Ald. 466; *Pyne v. Erle*, 8 T. R. 407; *Barker v. St. Quintin*, 12 Mee. & W. 441; *Langley v. Headland*, 19 C. B. (N.S.) 42.

(*f*) See *Welsh v. Hole*, 1 Dougl. 237; *Ormerod v. Tate*, 1 East, 464; *Read v. Dupper*, 6 T. R. 361; *Barker v. St. Quintin*, 12 Mee. & W. 441; *White v. Pearce*, 7 Hare, 276. The affidavit should show the amount claimed. (*Davies v. Lowndes*, 3 C. B. 808.) The same rule existed in favour of the proctor in the Admiralty Court. (*The Araminta*, Swab. 81.)

(*g*) *Swain v. Senate*, 2 Bos. & P. N. R. 99.

(*h*) *Gould v. Davis*, 1 Cr. & J. 415.

Paragraphs
550—552

rightly done; for otherwise (as for instance if he sued without authority), the court will give him no assistance (*i*). And he must earn his equitable remedy by doing whatever, under the circumstances, may be equitable on his part. Where, therefore, the debt was released to the defendant upon condition of his giving up to the plaintiff the pawn ticket for pledged property, the court refused to order the delivery of that property to the attorney after it had been redeemed by the plaintiff, unless the attorney would repay the plaintiff the redemption money (*k*).

While the sum agreed to be paid as a compromise is unpaid, the court, without otherwise disturbing the arrangement, will direct the defendant to pay the plaintiff's solicitor so much of it as will satisfy the lien (*l*).

Lien may be
destroyed.

551. The lien is at an end where the client, either by his own act, or by the act of the law and without collusion, is deprived of the means of further enforcing his claim against the opposite party (*m*).

How affected
by right of
set off.

552. In equity the client's right to set off (*n*) whatever may be due from him to the opposite party against the fund recovered, is not affected by the lien, it being considered that the lien only binds that which is ultimately found due to the client (*o*); but this rule did not apply to the set-off of the costs of different suits in equity, and still less to the set-off of costs in equity against costs at law (*p*).

It was said in one case that the lien of the solicitor was of such a substantial nature, that his client was a trustee for him; and that the costs in respect of which a lien was claimed, could not, in consequence, be set off against a debt due from the client (*q*). But this view has been disapproved as a general proposition: and it was held that a plaintiff could not avoid a set-off claimed by the other party, upon the ground that the plaintiff's solicitor had a lien for his costs upon the debt which the plaintiff was seeking to recover (*r*).

The former practice of the courts of law differed from that of the Court of Chancery, no set-off of damages or costs being allowed to

(*i*) *Abbott v. Rice*, 3 Bing. 132.

(*k*) *Langley v. Headland*, 19 C. B. (N.S.) 42.

(*l*) *Davies v. Lowndes*, 3 C. B. 808; *Slater v. Mayor of Sunderland*, 33 L. J. Q. B. 37.

(*m*) *Symons v. Blake*, 2 Cr. M. & R. 416.

(*n*) As to the right of set-off, see Judicature Act, 1873, s. 24, and Rules 1883, Order LXV. r. 14.

(*o*) *Per Lord ELDON, Taylor v. Popham*, 15 Ves. 72; *Bawtree v. Watson*, 2 Keen, 713; *Cattell v. Simons*, 6 Beav. 304; see *Exp. Rhodes*, 15 Ves. 539; *Verity v. Wyld*, 4 Drew. 427; *Roberts v. Buee*, 8 Ch. D. 198; *Pringle v. Gloag*, 10 Ch. D. 676; *Jenner v. Morris*, 11 W. R. 943. But see *Bailey v. Birchall*, 2 H. & M. 371.

(*p*) *Smith v. Brocklesby*, 1 Anst. 61; *Wright v. Mudie*, 1 Sim. & St. 266; *Collett v. Preston*, 15 Beav. 458.

(*q*) *Exp. Cleland*, L. R. 2 Ch. 808.

(*r*) *Mercer v. Graves*, L. R. 7 Q. B. 499. And see *Roberts v. Buee*, 8 Ch. D. 198.

the prejudice of the solicitor's lien for costs in the particular suit (s). According to the present rules of the Supreme Court, a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought (t), but not in different suits where there is an application under Order LXV. r. 14, to set off cross judgments unless the solicitor has misbehaved himself (u). Costs incurred in the High Court cannot be set off against costs obtained in the County Court (x).

Paragraphs
552—553

Where a husband has been ordered to pay money into court to enable his wife to obtain legal assistance in divorce proceedings, the wife's solicitor has a first claim on that fund, even although the wife be ordered to pay the husband's costs, and he will only be deprived of this right or lien if he acts oppressively or vexatiously. The mere fact that he enters a frivolous or hopeless appeal on the wife's behalf will not deprive him of his lien (y).

SUB-SECTION (7).—*Solicitor's Statutory Charge on Property Recovered or Preserved.*

553. In consequence of the decision of the House of Lords in *Shaw v. Neale*, 6 H. L. C. 581, that a solicitor could have no lien for costs against real estate, at law or in equity (because there could be no lien upon property unless it were in the possession of the person who claims the lien; a proposition entirely at variance with the principle upon which liens are founded in equity, under which jurisdiction the case arose) the statute 23 & 24 Vict. c. 127 was passed. By the 28th section of that Act, it was enacted, that in every case in which a solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, the court or judge before whom the same has been heard, or shall be depending—(that is to say, in the Chancery Division—the judge presiding in the branch of the court in which the litigation is or was pending (z), or the judge who has actually heard the cause, if it was heard by another judge (a); and in the Common Law Division the judge before whom the case was heard, or the division in which his jurisdiction has become vested (b)), may declare such

Nature of
the charge on
property
recovered or
preserved.

(s) Rule 63, Hil. T. 1853.

(t) Rules, 1883, Order LXV. r. 14; and see *McCormack v. Ross*, [1894] 2 Ir. Reps. 545; *Robarts v. Buee*, 8 Ch. D. at p. 200; *Pringle v. Gloag*, 10 Ch. D. 676; *Westacott v. Beavan*, [1891] 1 Q. B. 774.

(u) *Edwards v. Hope*, 14 Q. B. D. 922; *Blakey v. Latham*, 41 Ch. D. 518; and see also *Hassell v. Stanley*, [1896] 1 Ch. 607.

(x) *Hassell v. Stanley*, *supra*.

(y) *Hall v. Hall*, [1891] P. 302.

(z) *Heinrich v. Sutton*, L. R. 6 Ch. 865.

(a) *Owen v. Henshaw*, 7 Ch. D. 385.

(b) *Wilson v. Hood*, 3 H. & C. 148; *Catlow v. Catlow*, 2 C. P. D. 362; *Higgs v.*

Paragraphs
553—555

solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such solicitor shall have a charge upon and against, and a right to payment out of, the property of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of such solicitor, for the taxed costs, charges and expenses of, or in reference to such suit, matter, or proceeding. And such court or judge may make such orders for taxation, and for raising and payment of such costs, charges and expenses out of the said property, as may appear just and proper. The jurisdiction is discretionary, and an order will not be made where the effect would be to deprive trustees of their proper costs out of the estate (c). An order will only be made *ex parte* under special circumstances (d); and the lien will not confer a better title in favour of the solicitor than that of his client, *ex. gr.* where the property consisted of a Bill of Exchange (e).

Taxation may be directed under the Act independently of the limited right to taxation under the Solicitors Act, if, when the fund was paid in, there was a claim for an ascertained amount of costs (f).

Cases in
which the
Act does not
apply.

554. The Act does not apply where the solicitor has accepted from his client a mortgage or other security for his costs (g). But mere delay will not necessarily bar the solicitor (h). The Act was passed solely for the benefit of solicitors and not of clients, and the court will not allow the parties to an action to make use of it for the purpose of charging property recovered or preserved with the payment of costs which they are liable and able to pay personally (i). The Act, unlike the Common Law lien (542), does not extend to the costs of an arbitration (k).

Charge
cannot be
defeated
except by
sale, etc., to
bonâ fide
purchaser
without
notice.

555. The Act provides that all conveyances and acts operating to defeat such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void as against such charge or right (l). A person who takes a security upon an interest in a suit, takes subject to the liability to a charge under the Act, which will be preferred although the solicitor did not assert

Schrader, 3 C. P. D. 252. But the bankruptcy judge of the High Court has no jurisdiction as such to make an order; although, as the judge before whom any such matter, etc., has been heard, or may be depending, he has such jurisdiction: *Re Wood, Ex p. Fanshawe*, [1897] 1 Q. B. 314.

(c) *Re Turner, Wood v. Turner*, [1907] 2 Ch. 539.

(d) *The Birnam Wood*, [1907] P. 1.

(e) *Redfern & Son v. Rosenthal & Co.*, 86 L. T. 855.

(f) *De Bay v. Griffin*, L. R. 10 Ch. 291.

(g) *Groom v. Cheeswright*, [1895] 1 Ch. 730.

(h) *Re Born, Curnock v. Born*, [1900] 2 Ch. 433.

(i) *Harrison v. Cornwall Mineral Rail. Co.*, 53 L. J. Ch. 596.

(k) *Macfarlane v. Lister*, 37 Ch. D. 88.

(l) *The Paris*, [1896] P. 77; *The Birnam Wood*, *supra*.

his right when the security was made (*m*). And a garnishee order *ex parte* to attach a fund, will be postponed to the charge of the solicitor, whether the latter was asserted before or after the date of the garnishee order (*n*). But in a partnership action, where the creditors are not before the court, the charge does not take priority of their claims (*o*). The Act also provides, that no such order shall be made where the right to recover payment of such costs, charges and expenses is barred by any statute of limitations; nor will an order be made where (apart from the statute) there has been delay, and other parties have in the interim acquired rights (*p*). The charge may, however, be made after the bankruptcy of the client, and in that case takes priority of the claims of the client's landlord (*q*). But that depends upon whether the solicitor has really, by his exertions, recovered or preserved or originated proceedings which have resulted in the recovery or preservation of the property (*r*).

Paragraphs
555—557

556. The right to a charge under the Act, may be declared where the client is a married woman, although the property be settled to her separate use without power of anticipation (*s*). And it *may* (but will not as a matter of course) be made on a wife's permanent alimony obtained in a divorce suit (*t*). The solicitor of the next friend of an infant plaintiff, may, by means of an action, obtain a declaration of right to a lien for his costs (*u*); but it seems that he cannot get it under the Act during the infancy (*x*), but must wait until the infant has attained majority and has adopted the proceedings; which, under the circumstances, he will be considered to have done by a slight interference; such as applying to discharge a receiver, and that he may pass his accounts (*y*).

Charge applies to property of infants and married women with restraint on anticipation.

557. Property is considered to have been "recovered or preserved," when, on a liberal construction of the Act, the litigation has produced results favourable to the person who employs the

What amounts to recovery or preservation

(*m*) *Faithfull v. Ewen*, 7 Ch. D. 495; *Cole v. Eley*, [1894] 2 Q. B. 350.

(*n*) *Dallow v. Garrold*, 14 Q. B. D. 543; *Birchall v. Pugin*, L. R. 10 C. P. 397; *Hamer v. Giles*, 11 Ch. D. 942; *Brown v. Trotman*, 12 Ch. D. 880; *Shippey v. Grey*, 49 L. J. C. P. 524.

(*o*) *Exp. Digby*, *Jackson v. Smith*, 53 L. J. Ch. 972; but see *Exp. Lovett*, *Re Nicholas*, 61 L. T. 87.

(*p*) *Roche v. Roche*, 29 L. R. Ir. 339; and see *per* POLLOCK, B., *Dallow v. Garrold*, *supra*.

(*q*) *Exp. Brown*, *Re Suffield and Watts*, 20 Q. B. D. 693.

(*r*) *Keeson v. Luxmore*, 61 L. T. 199.

(*s*) *Re Keane*, *Lumley v. Desborough*, L. R. 12 Eq. 115.

(*t*) *Harrison v. Harrison*, 13 P. D. 180; *Croghan v. Maffett*, 28 L. R. Ir. 97.

(*u*) *Pritchard v. Roberts*, L. R. 17 Eq. 222.

(*x*) *Bonser v. Bradshaw*, 4 Giff. 260. On appeal (10 W. R. 481), held that the application would not be heard unless it was substantially opposed on behalf of the infant. This does not apply where there has been a compromise sanctioned by the Court on behalf of the infant [558].

(*y*) *Baile v. Baile*, L. R. 13 Eq. 497.

Paragraph
557
of property
for purposes
of Act.

solicitor (z) : the payment of money by the defendant into court in the same or another suit as the result of the solicitor's proceedings (a), even though the defendant who pays it in refuses to admit his liability (b) ; the appointment of a receiver, whether it be made adversely (c) or by consent (d) ; or the management of the estate and the due application of the rents in the suit (e) ; or a compromise where the compromise is in substance the fruit of the action (f) ; or the reduction of a claim or lien on property (g) ; is sufficient to make the statute apply. And when the suit has manifestly been for the benefit of all parties, the solicitor of the plaintiff will be entitled to a charge on the whole property in litigation, irrespective of the fact that the interest in it of his client is limited (h) (*ex. gr.* is a life interest), and although, upon taking the accounts, the client may be found a debtor to the estate (i). But it has been held otherwise where (as in the case of a tenant in tail who died without having barred the entail), the interest of the client in the property has ceased (k) ; as also where there was no proof of the recovery or preservation of any property except the making of a decree for administration, the appointment of a new trustee, and the bringing in of some accounts (l). On the other hand, where the solicitor acting for executors defeated a hostile creditor's administration suit, he was held to be entitled to a charge (m).

It was held that there was no preservation of property within the Act, where, the suit being to restrain the client from so building as to obstruct ancient lights, part of the building in question was, by agreement, allowed to remain ; and an easement being only something incident to property, it seems that no charge upon it is possible (n). Nor can a charge be made on money ordered to be paid into court by the client, and which is subsequently ordered to be repaid to him (o).

(z) *The Phillipine*, L. R. 1 Ad. & E. 309 ; *Scholefield v. Lockwood*, L. R. 7 Eq. 83.

(a) *Clover v. Adams*, 6 Q. B. D. 622 ; *Callow v. Catlow*, 2 C. P. D. 362.

(b) *Emden v. Carte*, 19 Ch. D. 311.

(c) *Twynam v. Porter*, L. R. 11 Eq. 181 ; *Exp. Brown, Re Suffield and Watts*, 20 Q. B. D. 693.

(d) *Bailey v. Birchall*, 2 H. & M. 371.

(e) *Baile v. Baile*, L. R. 13 Eq. 497.

(f) *Ross v. Buxton*, 42 Ch. D. 190.

(g) *Pelsall Co. v. London and North Western Rail. Co.*, 8 Railway and Canal Traffic Cases, 146.

(h) *Greer v. Young*, 24 Ch. D. 545.

(i) *Bailey v. Birchall*, 2 H. & M. 371 ; *Bulley v. Bulley*, 8 Ch. D. 479 ; and see *Shevlin v. M'Grane*, 17 L. R. Ir. 271 ; *Re White*, 17 L. R. Ir. 223 ; and *Scholey v. Peck*, [1893] 1 Ch. 709 ; see *Ridd v. Thorne*, [1902] 2 Ch. 344.

(k) *Berrie v. Howitt*, L. R. 9 Eq. 1.

(l) *Pinkerton v. Easton*, L. R. 16 Eq. 490.

(m) *Re Dickinson*, W. N. (1888) p. 94.

(n) *Foxon v. Gascoigne*, L. R. 9 Ch. 654.

(o) *Pierson v. Knutsford Estates Co.*, 13 Q. B. D. 666 ; *Re Wadsworth, Rhodes*

558. The solicitor may be entitled to an order after he has been discharged, as he cannot then enforce the order for taxation (*p*). But, in that case, his charge is subject to that of the solicitor for the time being (*q*). And also if the suit has been compromised without his knowledge, and the compromise gives him less than he would have under the Act (*r*). Nor does the fact that a compromise has been sanctioned by the court on behalf of an infant deprive the solicitor of his lien on the infant's interest (*s*). But where an order had already been made for taxation and payment of the costs out of the trust estate, a charge under the Act was refused, on the ground that it would give no better security than the existing order (*t*).

Paragraphs
558—561

Solicitor entitled to the charge after he has been discharged or retired, and in spite of a compromise.

The solicitor may also obtain a charge after he has discharged himself, if he did not do so wrongfully (*u*).

559. The right to the declaration extends to the personal representatives of the solicitor (*x*); and it may also be enforced after the death of his client, and after an order for sale of the property in a suit to administer his estate; but the order will not be extended to the costs of proceedings not included in the taxed costs, charges, and expenses incurred in the suit (*y*).

Personal representatives of solicitor entitled to the charge.

560. It has been held that a charge may be made (*z*), not merely in favour of a solicitor against his client, but also in favour of the London solicitor, for costs due from the country solicitor, for whom he has acted as agent, though the balance of such costs be not ascertained; and an inquiry may be directed to ascertain their amount. But in *Macfarlane v. Lister* (*a*), it was held by the Court of Appeal that the client's own solicitor, and not that solicitor's London agent, could alone get a charge. It would seem, however, that the assignee of the solicitor is entitled to the charge (*b*).

Quære whether right extends to London agent.

561. A charge has been made by a common law court for common law costs, though the property was in course of administration in Chancery; the applicant not having come so late as to interfere with the distribution (*c*).

One court can give the charge over property being administered in another.

v. Sugden, 29 Ch. D. 517; *Maxon v. Sheppard*, 24 Q. B. D. 627, is *contra*, but *Pierson v. Knutsford Estates Co.* and *Re Wadsworth*, *Rhodes v. Sugden*, were not cited.

(*p*) *Pilcher v. Arden*, 7 Ch. D. 318.

(*q*) *Re Wadsworth*, *Rhodes v. Sugden*, *supra*; *Re Knight*, *Knight v. Gardner*, [1892] 2 Ch. 368.

(*r*) *Twynam v. Porter*, L. R. 11 Eq. 181; and see *The Hope*, 8 P. D. 144; but distinguish *Rowlands v. Williams*, W. N. (1885) p. 194.

(*s*) *Re Wright's Trust*, *Wright v. Sanderson*, [1901] 1 Ch. 317.

(*t*) *Re Viney*, 18 L. T. (N.S.) 851.

(*u*) *Clover v. Adams*, 6 Q. B. D. 622.

(*x*) *Baile v. Baile*, L. R. 13 Eq. 497.

(*y*) *Wilson v. Round*, 4 Giff. 416.

(*z*) *Tardrew v. Howell*, 3 Giff. 381.

(*a*) *Macfarlane v. Lister*, 37 Ch. D. 88.

(*b*) *Briscoe v. Briscoe*, [1892] 3 Ch. 543.

(*c*) *Re Seaman*, *Wilson v. Hood*, 10 Jur. (N.S.) 592; see *Catlow v. Catlow*, 2 C. P. D. 362.

Paragraphs
562—566

Effect of
counter-
claim and set
off on
solicitor's
charge.

Practice.

Quære
whether
solicitor can
be heard on
appeal.

The parties
liable on judg-
ment ignore
solicitor's
charge at
their peril.

Comparison
of statutory
charge with
the solicitor's
equitable
lien.

562. Where there is a counter-claim or set-off pleaded in an action, the charge can only affect the balance which is found due to the client (*d*), the claim and counter-claim being substantially one action. But where there are distinct cross actions, the court, upon an application to set off the cross judgments, is entitled in its discretion (notwithstanding Order LXV. r. 14) to order that the set-off shall be subject to the lien for costs of the solicitor for the opposite party (*e*). There is no set-off allowed of costs due in the High Court against costs due in the county court (*f*).

563. The order may be obtained on summons as well as on petition, and it is sufficient if the application be entitled in the action or matter without mentioning the act (*g*). Only the litigant whose property is to be affected, should be served (*h*). And the solicitor must bear his own costs of obtaining a stop order, and of appearing, if he think fit to appear, at the hearing of the action (*i*).

The order ought to be expressly limited to the costs properly incurred, and ought to direct taxation of such costs (*k*).

To enable the solicitor to recover his costs, the order reserves liberty to apply to the judge to enforce it by sale or otherwise (*l*).

564. It is questionable whether a solicitor who has obtained a charging order on the fruits of a judgment, can claim to be heard on an appeal against that judgment (*m*).

565. If the client and the other party's solicitors ignore the charge, and pay over or receive the money, as the case may be, they make themselves personally liable to the solicitor (*n*).

566. Apart from its application to real estate, the statutory right is less extensive than that which was already enjoyed by the solicitor; for whereas his lien is an equitable right which cannot be defeated by the client's assignment of the fund, or by a stop order by the assignee (*o*), the assignment by the client to a *bonâ*

(*d*) *Westacott v. Bevan*, [1891] 1 Q. B. 774; and see *per* HALL, V.-C., in *Roberts v. Buce*, 8 Ch. D. at p. 200.

(*e*) *Edwards v. Hope*, 14 Q. B. D. 922. This case seems to have been decided in reference to a solicitor's ordinary equitable lien, but it seems equally applicable to his statutory lien.

(*f*) *Hassell v. Stanley*, [1896] 1 Ch. 607.

(*g*) *Hamer v. Giles*, 11 Ch. D. 942; explained in *Exp. Digby, Jackson v. Smith*, 53 L. J. Ch. 972; *Clover v. Adams*, 6 Q. B. D. 622.

(*h*) *Brown v. Trotman*, 12 Ch. D. 880.

(*i*) *Mildmay v. Quicke*, 6 Ch. D. 553.

(*k*) *Emden v. Carte*, 19 Ch. D. 311.

(*l*) *Pülcher v. Arden*, 7 Ch. D. 318; *Bulley v. Bulley*, 8 Ch. D. 479. But no order for sale of the client's share in an estate being administered by the court will be made before the hearing of the further consideration of the administrative action: *Re Green, Green v. Green*, 26 Ch. D. 16.

(*m*) *Wiedemann v. Walpole*, 7 T. L. R. 627.

(*n*) *Ross v. Buxton*, 42 Ch. D. 190.

(*o*) *Haymes v. Cooper*, 33 Beav. 431.

fide purchaser for value without notice, is not void against the statutory charge. Nor can that charge be obtained when the remedy for costs is barred by the Statute of Limitations; by which neither the solicitor's lien on a judgment (*p*), nor a possessory lien, is affected (*q*).

Paragraphs
566—567

SUB-SECTION (8).—*Maritime Liens.*

567. The maritime law, like the civil law upon which it is founded, admits the validity of a lien without possession; and if reasonable diligence be used and the proceeding be *bonâ fide* (*r*), such a lien is not discharged by the sale of the ship, but may be enforced against purchasers without notice (**572**); the meaning of "reasonable diligence" being, not the doing of everything possible, but of that which, having regard to all the circumstances, including considerations of expense and difficulty, could be reasonably required (*s*). The lien is enforceable only by a proceeding *in rem*, and when declared by a foreign court the English courts will enforce it only when the proceeding was of that nature; the fact that there was a personal action, which might afterwards be made available against the ship, not being enough (*t*). By it, in addition to his personal remedy against the owner (*u*), the mariner has a lien for his wages upon the ship, which he may secure by arresting it (*v*); and upon the freight, if any be earned; but not upon the cargo or the money received in respect of its insurance; nor upon any other ship than that in which he performed his services (*w*). The lien for wages may also be enforced by a person who pays them on the credit of the ship (*x*). Salvors have also a lien upon the ship for the reward of their labours; and the like privilege is given to demands for pilotage. There are also dicta for the proposition that there is a maritime lien for ordinary towage (*y*) services, but in *Westrup v. Great Yarmouth Steam Carrying Co.* (*y*), *Kay, J.*, expressly negatived that proposition. The registered owner of a ship who has sold her has a lien for necessities supplied by him to enable her to undertake the voyage to the purchaser (*z*). Salvage liens, where they exist, are allowed upon the equitable principle that the

Nature of
maritime
liens for
wages,
salvage,
pilotage, etc.

(*p*) *Higgins v. Scott*, 2 B. & Ad. 413.

(*q*) *Spears v. Hartley*, 3 Esp. 81.

(*r*) *The Kong Magnus*, [1891] P. 223.

(*s*) *Harmer v. Bell (The Bold Buccleugh)*, 7 Moo. P. C. 267; *Tatham v. Andrée*, 1 Moo. P. C. (N.S.) 386; *The Europa*, 9 Jur. (N.S.) 699; *The Nymph*, Swab. 86; *The Fairport*, 8 P. D. 48.

(*t*) *The City of Mecca*, 6 P. D. 106. It was said that an action *in rem* cannot be brought by the law of Portugal.

(*u*) *Duncan v. Benson*, 1 Ex. 537; *Benson v. Duncan*, 3 Ex. 644.

(*v*) *The Nicolai Heinrich*, 17 Jur. 329.

(*w*) *The Julindur*, 1 Sp. 71.

(*x*) *Clark v. Bowring*, [1908] S. C. 1168 (Court of Sess.).

(*y*) See cases collected in *Westrup v. Great Yarmouth Steam Carrying Co.*, 43 Ch. D. 241.

(*z*) *Foong Tai v. Buchheister*, [1908] A. C. 458.

Paragraphs
567—569

owner of the ship shall not profit by the exertions of those by whom his property has been saved or made profitable without making a due recompense (*b*). It is, however, settled, that there cannot be a maritime lien on freight where there is no lien upon the ship itself in respect of the same debt (*c*).

Master not
entitled to a
lien for
wages and
expenditure
apart from
statute.

568. But, except by statute (**569**), neither the master of the ship (as distinguished from the crew) for his wages, nor he, nor any other creditor (unless a possessory lien can be established), in respect of advances for the fitting, repairs or other uses or necessities of the ship in this country, or for premiums paid by the master for procuring cargo, are entitled by the law of England to any lien upon the ship (*d*); although such liens were and are recognized by the civil law (*e*), and by the laws of those countries which have adopted it.

Yet, even by English law, if the master, as the owner's agent, had made a special contract for the use of the ship, in a manner which necessitated an outlay upon it, the matter might be treated as one between principal and agent; and the owner and his mortgagees, either admitting the agency, or not repudiating the contract, would not be allowed to take the benefit without bearing the burthen. The master, therefore, in such a case, has been held entitled to a lien on the ship and on the money produced by the contract, for his outlay, and by way of indemnity against all liability incurred in the transaction (*f*).

Provisions in
favour of
master, of
Merchant
Shipping
Act.

569. And by the Act 7 & 8 Vict. c. 112, s. 16, and the yet larger provisions in favour of the master contained in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167, every master of a ship has, so far as the case permits, the same rights, liens and remedies for the recovery of his wages, which by the latter statute, or by any law or custom, any seaman, not being a master, has for the recovery of his wages. This provision relates only to claims for the master's wages against the owner and his property, and does not alter the relation between master and seaman (*g*). And as both masters and seaman were still left without any remedy in the Admiralty Court for wages, when the wages were due under a special contract, the Admiralty Court Act, 1861 (*h*), gave to the

(*b*) *The Dowthorpe*, 2 W. Rob. 73; *The Louisa Bertha*, 14 Jur. 1007; *The Linda Flor*, 4 Jur. (N.S.) 172; *The Lady Durham*, 3 Hag. Ad. 196.

(*c*) *The Castlegate*, *Morgan v. The Castlegate Steamship Co.*, [1893] A. C. 38.

(*d*) *Wilkins v. Carmichael*, Dougl. 101; *Buxton v. Snee*, 1 Ves. Sen. 154; *Watkinson v. Bernadiston*, 2 P. W. 367; *Smith v. Plummer*, 1 B. & Ald. 575; *Hussey v. Christie*, 13 Ves. 594; *The Neptune*, 3 Knapp, 94; *The Pacific*, 10 Jur. (N.S.) 1110; *The Scio*, L. R. 1 Ad. & E. 353.

(*e*) *Abbott on Shipping*, 142, 149; Colquhoun, Sum. Rom. C. L. § 1480; *Stainbank v. Fenning*, 15 Jur. 1082; per JERVIS, C.J.

(*f*) *Bristow v. Whitmore*, 9 H. L. C. 391.

(*g*) *The Salacia*, 9 Jur. (N.S.) 27.

(*h*) 24 Vict. c. 10.

High Court of Admiralty, jurisdiction over any claim by a seaman of any ship, for wages earned by him on board the ship, whether due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship (*i*), with a proviso that the plaintiff shall not be entitled to costs where he shall not recover 50*l.* unless the judge shall certify that the cause was a fit one to be tried in the court. The word "disbursements" applies to liabilities incurred, as well as to money actually laid out by the master for the use of the ship (*j*).

Paragraphs
569—571

570. The Act of 1861 also gave jurisdiction to the Admiralty Court (now vested in the Admiralty Division of the High Court), over the claims for the building, equipping or repairing of any ship, if at the time of the institution of the cause, the ship or the proceeds thereof are under the arrest of the court (*k*); and over claims for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it be shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner (*l*) of the ship is domiciled in England or Wales; but with a proviso that if the plaintiff do not recover 20*l.*, he shall have no right to costs, unless the judge shall certify that the cause was a fit one to be tried in the court (*m*). This gives the plaintiff a lien as from the moment of arrest (*n*) (**572**). The jurisdiction extends to claims for repairs and necessities done and supplied to a foreign ship in a foreign port (*o*), and takes priority over a vendor's lien for purchase money of the ship (*p*), and is claimable by a mate who has properly made such expenditure (*q*).

Statutory
right in *rem*
for building,
repairing, or
equipping
ships.

571. The jurisdiction is also given over any claim by the owner, consignee or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship, for damage to the goods or any part thereof by the negligence, misconduct, or breach of duty or contract, on the part of the owner, master or crew of the ship; unless it be shown that at the institution of the cause, any owner

Statutory
right in *rem*
for damage
to cargo
caused by
negligence,
etc., of owner,
master, or
crew.

(*i*) See *The Cairo*, 99 L. T. 940.

(*j*) *The Feronia*, L. R. 2 Ad. & E. 65; *The Fairport*, 8 P. D. 48.

(*k*) Section 4.

(*l*) *I.e.*, owner or part owner when the supplies were furnished. *The Ella A. Clark*, 9 Jur. (N.S.) 312; overruled, but on another point, by *The Heinrich Björn* 10 P. D. 44.

(*m*) Section 5. This applies only to British and colonial ships, and does not supersede s. 6 of 3 & 4 Vict, s. 65, which gives jurisdiction in cases of supplies to foreign ships, both in English and colonial ports. (*The Ella A. Clark*, *supra*; *The Wataga*, Swab. 165.)

(*n*) *The Cella*, 13 P. D. 82.

(*o*) *The Mecca*, [1895] P. 95; overruling *The India*, 9 Jur. (N.S.) 417.

(*p*) *Foong Tai & Co. v. Buchheister & Co.*, [1908] A. C. 458.

(*q*) *The Cairo*, 99 L. T. 940.

Paragraphs
571—572

or part owner of the ship is domiciled in England or Wales ; with a like proviso as to costs, as in the case of the claim for necessities (*r*).

This liability is, however, limited by s. 502 of the Merchant Shipping Act, 1894, which provides that the owner of a British sea-going ship, or any share therein, is not liable to make good any loss or damages happening without his actual fault or privity in the following cases ; namely—

- (i.) Where any goods, merchandise, or other things whatsoever, taken in or put on board his ship are lost or damaged by reason of fire on board the ship ; or
- (ii.) Where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.

Distinction
between
maritime lien
and statutory
remedy
against the
res.

572. After considerable conflict of authority, it appears that there is a lien, *i.e.*, a charge upon the ship, under the Act of 1861, for seamen's wages, and for damage to the ship ; but for building, equipping or repairing a ship, or for necessities supplied to her in England, or for disbursements made by the master (*s*), or for damage to the goods, the Act gave no maritime lien, but only a statutory remedy against the *res* (*t*). However, by section 167 of the Merchant Shipping Act, 1894, a maritime lien has now been conferred on the master for disbursements and liabilities properly made or incurred on account of the ship. The distinction between a mere statutory remedy against the *res* and a maritime lien is highly important. The former cannot affect purchasers of the ship before action brought, even though they have notice of the claim (*u*) ; and still less can it affect prior incumbrancers. A maritime lien, on the other hand, enjoys special priority (**567, 1259–1265**). Moreover, where the owners or mortgagees of a vessel permit others to have the possession and use of her, and are not personally liable for disbursements, the master's lien for necessary disbursements nevertheless attaches unless he had notice or knowledge that the parties in possession were not the true owners (*ex. gr.*, were mere

(*r*) Act of 1861, Section 6.

(*s*) *The Sara*, 14 App. Cas. 209, overruling *The Mary Ann*, L. R. 1 Ad. & E. 8, and *The Feronia*, L. R. 2 Ad. & E. 65 on this point. And see also *The Tagus*, [1903] P. 44. The lien may under Local Acts be subject to prior claims for Dock or Harbour rates, see *The Emilie Millon*, [1905] 2 K. B. 817.

(*t*) See *The Heinrich Björn*, *supra* ; *The Gustaf*, 31 L. J. Ad. 207 ; *The Pacific*, Br. & L. 243 ; *The Troubadour*, L. R. 1 Ad. & E. 302 ; *Johnson v. Black*, *The Two Ellens*, L. R. 4 P. C. 161 ; *The Aneroid*, 2 P. D. 189.

(*u*) *Per Fry*, L.J., *The Heinrich Björn*, 10 P. D. 44.

charterers) (x), and had personally undertaken to pay all disbursements (y). The fact of the master being part owner does not affect his maritime lien (z). Paragraphs
572—576

573. The consignee of the ship and cargo has a lien on the proceeds of the cargo, for what he has laid out to enable the ship to proceed on her voyage. And even one who is not a consignee, but has made such an advance *bona fide*, and with the sanction of the owner of the cargo, who thereby obtains the benefit of the advance, is entitled to a lien on the proceeds of the cargo if he can arrest them before they come to the hands of the shipper, subject to proper deductions in favour of the consignee; and the lien will extend to all loss and damage arising from a breach of contract by the consignor to consign the cargo to him: but not to any commission or profit which might have been earned in respect of the consignment, if it had been so made (a). Lien of
consignee of
ship and
cargo.

574. The owners of cargo sold for the necessities of the ship, have no lien upon the ship for the amount of their loss, which is the subject of general average (b); nor does the right to general average contribution after adjustment, give the owner of the cargo any lien under the maritime law, unless, by reason of the possession of the cargo, it can be maintained as a possessory lien (c). Owners of
cargo have
no lien
on ships for
losses which
are subject
of general
average.

575. There is a statutory lien upon any vessel, her cargo, or apparel, stranded or in distress on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, for a reasonable amount of salvage and expenses properly incurred, in assisting, or saving that vessel (d) or the cargo or apparel of such vessel, or any portion thereof, saved by any other person than a receiver of wreck within the United Kingdom (e) (1260). And the freight and cargo contribute with the ship to this charge (f). Lien for
salvage of
vessel, etc.

576. Where services are rendered, wholly or in part within British waters, in saving life from any British or foreign vessel, or elsewhere from any British vessel, there is a lien upon the vessel, her cargo or apparel to pay salvage (g). Lien for
salvage of
life.

(x) *The Ripon City*, [1897] P. 226. But as to the ultimate incidence of such disbursements as between the owners and mortgagees of shares in the ship; see *The Ripon City* (No. 2), [1898] P. 78. See also *The Edwin*, 33 L. J. Ad. 197.

(y) *The Castlegate*, *Morgan v. The Castlegate Steamship Co.*, [1893] A. C. 38.

(z) *The Feronia* (*supra*).

(a) *Young v. Neill*, 32 Beav. 529. (b) *The La Constancia*, 2 W. Rob. 487.

(c) *The North Star*, 1 Lush, 45; *Cleary v. M'Andrew* (*The Galem, Cargo ex*), 2 Moo. P. C. (N.S.) 216.

(d) *The Fusilier*, Br. & L. 350.

(e) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 483, 544 (1), (2), (3), 546. There is no right of action for the salvage of life unless property is saved, nor for a floating body (*ex. gr.* a buoy) which is not a boat, or ship, or wreck. *The Gas Float Whitton* (No. 2), [1896] P. 42; *affd.* (H.L.), [1897] A. C. 337; *The Fusilier, supra*; *The Renpor*, 8 P. D. 115.

(f) *The Fusilier, supra*.

(g) *The Hestia*, [1895] P. 193.

Paragraphs
577—578

Salvage
claims
arise apart
from
contract.

Lien for
damage done
to another
vessel, or the
cargo, or
crew, or
passengers,
is limited in
amount.

577. Salvage claims rest not upon contract, but upon the right to be paid out of the property ; and therefore, a salvor who has contributed, though to a small extent, to the ultimate safety of the disabled vessel, is not wholly disentitled to remuneration because he acted under an express agreement which he failed to perform (*g*). But the right to salvage may be lost where the salvors are working under a contract with the underwriters who are not the owners (*h*).

578. There is also a lien upon a ship and freight for the amount of the damage, which wrongfully (that is, by the fault of those in charge of her), does injury to another ship (*i*). Independently of the statute law, the ship owner was also personally liable to the whole amount of such damage. And where the owner is not liable there will be no lien on the ship (*k*). But, following the example set by several foreign nations in narrowing this liability, it has been enacted (*l*) that the owners of any ship (which comprises a charterer who navigates her by his own master and crew (*m*)), whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,—

- (1.) Where any loss of life or personal injury is caused to any person being carried in such ship ;
- (2.) Where any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship ;
- (3.) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship ;
- (4.) Where any loss or damage is caused by any other vessel, or to any goods, merchandise or other things whatsoever on board any other vessel, or to property or rights of any kind whether on land or water (*n*), by reason of the improper navigation of the ship ;

be answerable in damages in respect of loss of life or personal injury (either alone, or together with loss or damage to vessels, boats, goods, merchandise, or other things) to an aggregate amount exceeding 15*l*. for each ton of their ship's tonnage, nor in respect of loss or damage to vessels, goods, merchandise or other things, (whether there be in addition loss of life or personal injury or not,)

(*g*) *The Hestia*, [1895] P. 193.

(*h*) *The Solway Prince*, [1896] P. 120.

(*i*) *The Aline*, 1 W. Rob. 111 ; *Harmer v. Bell (The Bold Buccleugh)*, 7 Moo. P. C. 267 ; *The Europa*, 9 Jur. (N.S.) 699 ; *The Tasmania*, 13 P. D. 110. As to laches in suing a foreign ship for damages by collision, see *The Kong Magnus*, [1891] P. 223.

(*k*) *The Castlegate*, *Morgan v. The Castlegate Steamship Co.*, [1893] A. C. 38, 52 ; *The Utopia*, [1893] A. C. 492, 499.

(*l*) Merchant Shipping Amendment Act, 1894 (57 & 58 Vict. c. 60), s. 503 ; substituting the present provisions for those of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 504.

(*m*) *Sir John Jackson, Ltd. v. Owners of The Blanche*, [1908] A. C. 126 ; and Merchant Shipping Act, 1906 (6 Ed. 7, c. 48) sect. 71 ; and as to builders and owners prior to registration see Merchant Shipping Act, 1898 (61 & 62 Vict. c. 14), s. 1.

(*n*) Merchant Shipping Act, 1900 (63 & 64 Vict. c. 32), s. 1.

to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage. Such tonnage is to be the registered tonnage in the case of sailing ships; and in the case of steam ships, the gross tonnage without deduction on account of engine room.

Paragraphs
578—581

The owner of an unregistered British ship is not entitled to this limitation (*o*).

Interest is payable from the date of the collision when the ship is in ballast, and from the natural termination of the voyage when freight is payable (*p*).

579. This statute, being expressly made applicable to any ship, whether British or foreign, follows a British ship into all seas, and applies to all foreign ships in British waters; but will not *avail* British ships in foreign countries, nor, it is said, foreign ships before British courts, in case of damage on the high seas beyond the jurisdiction of the British legislature (*q*).

How far
limitation of
liability
applies to
foreign ships.

Under the Act of 1854, where the damage was caused by a British to a foreign ship within three miles of the British coast, the former was (*r*) entitled to the benefit of the Act. But a foreigner could not be relieved in respect of damage done on the high seas to a British ship (*s*), nor, it seems, could a British ship which had damaged a foreigner; nor could one foreigner claim the benefit of the Act against another (*t*).

580. The liability arises in respect of every loss of life, personal injury, or loss of or damage to goods *arising on distinct occasions*, to the same extent as if no other loss, injury, or damage had arisen (*u*). But where a ship collides with two vessels one after another, substantially at the same time, and *as the result of one act of improper navigation*, the owner is entitled to limit his liability to one payment for the whole damage (*x*).

Liability
arises on *each*
occasion of
damage.

581. The Merchant Shipping Act, 1894, s. 504, provided, that the benefit of the statute might be obtained by the ship owner, against whom claims are made or apprehended, in respect of liability for loss of life, personal injury or damage, by proceedings in the High Court (*y*) in England or Ireland, the Court of Session in Scotland, or any competent court in a British possession, to determine the amount of the liability and make a rateable

Courts
having
jurisdiction.

(*o*) *The Andalusian*, 3 P. D. 182.

(*p*) *Straker v. Hartland*, 2 H. & M. 570; *The Northumbria*, L. R. 3 Ad. & E. 6; *Smith v. Kirby*, 1 Q. B. D. 131.

(*q*) *Cail v. Papayanni*, 1 Moo. P. C. (N.S.) 471; *MacLach. Shipping*, Suppl. 36.

(*r*) *General Iron Screw Collier Co. v. Schurmanns*, 1 Johns & H. 180.

(*s*) *The Wild Ranger*, 9 Jur. (N.S.) 134.

(*t*) *Cope v. Doherty*, 4 K. & J. 367.

(*u*) Merchant Shipping Act, 1894, s. 503 (3).

(*x*) *The Rajah*, L. R. 3 Ad. & E. 539; but *aliter* where there are two distinct faults, see *The Schwan*, [1892] P. 419.

(*y*) See the Judicature Act, 1873, ss. 3, 16.

Paragraphs
581—582

distribution among the claimants. And for this purpose, the courts were empowered to stop all actions and suits pending in any other courts in relation to the same subject matter, and to regulate the proceedings as to the parties, the exclusion of claimants who do not come within a certain time, the requiring security from the owner, and the payment of costs. These provisions of the Act were held to apply, though the adverse claimant had obtained a definitive judgment of the Court of Admiralty condemning the ship. The Court of Chancery, however, could not prevent a person who had obtained such a judgment from selling the ship, and retaining out of the proceeds such costs as he might be entitled to under the order of the Court of Admiralty; but would prevent him from obtaining more than his rateable share of the proceeds of the sale, and for that purpose would order (z) payment of the balance of the proceeds into court. Since the Judicature Act, however, such questions could not arise.

Practice
where ship
owners are
a liquidating
company.

582. If the ship owners are a company in liquidation, the lien should be enforced in the winding-up proceedings, by asking for a sale and application of the proceeds to satisfy the lien, or that security may be given for the amount (a). Or, if there are mortgagees not before the court, by asking for leave to proceed in the Admiralty, or for security (b).

(z) *Leycester v. Logan*, 3 K. & J. 446.

(a) *Re Australian Direct Steam Navigation Co.*, L. R. 20 Eq. 325.

(b) *Re Rio Grande Do Sul Steamship Co.*, 5 Ch. D. 282.

CHAPTER II.

Of Possessory Liens and herein of Specific and General Liens.

	PARAGRAPHS	Paragraph
Section I.—Of the Nature and Division of Possessory Liens	583—595	583
„ II.—Of General Liens	596—602	
„ III.—Of the Particular Debts for which Promissory Liens may be Claimed	603—673	
SUB-SECT. (1).—THE LIEN OF VENDORS OF CHATTELS ..	604—606	
„ (2).—THE LIEN FOR SUPPLIES OR SERVICES UNDER LEGAL OBLIGATIONS AND HEREIN OF THE LIENS OF INNKEEPERS, CARRIERS, SHIPOWNERS, AND OTHERS..	607—622	
„ (3).—THE LIEN FOR LABOUR UPON CHATTELS	623—630	
„ (4).—THE LIEN OF SOLICITORS ON DOCUMENTS	631—659	
„ (5).—THE LIENS OF FACTORS, BROKERS, BANKERS AND AGENTS	660—673	

SECTION I.

Of the Nature and Division of Possessory Liens.

<i>Nature of possessory liens</i>	583
<i>Either general or specific</i>	584
<i>Chattel must belong to debtor in same character as that in which debt is owing</i>	585
<i>Possession essential to validity of lien</i>	586
<i>Chattel must have come to hands of creditor in ordinary course of dealing</i>	587
<i>Possession of creditor need not be corporeal</i>	588
<i>Possession must be continuous.. .. .</i>	589
<i>Lien may arise where special contract.. .. .</i>	590
<i>Where no corporeal possession by creditor, he must show that actual possessor is his agent.. .. .</i>	591
<i>No lien on chattels in hands of officers of the court</i>	592
<i>Documents on which there is no lien</i>	593
<i>Person entitled to lien cannot add warehouse charges</i>	594
<i>Lien on money</i>	595

583. Possessory liens depend upon the same equitable principles as equitable liens (504–505). They subject *personal chattels* belonging to the debtor, to the claim of his creditor, whose possession of the chattels was always, both at law and in equity, necessary

Nature of
possessory
liens.

Paragraphs
583—586

for the validity of the lien (*a*), and (except in some cases of special custom) his sole remedy (929).

Either
general or
specific.

584. Possessory liens are either *specific* or *general*; the former, which are favoured in law, enabling the holder of the chattel to retain it only until payment of the particular debt which is due in respect of the chattel; the latter, which are regarded with jealousy by the courts, extending to any balance which may be due from the owner of the chattel to the person who holds it, and arising only by usage or agreement in favour of persons who carry on some particular kinds of business (*b*).

Before noticing in detail the different cases in which general and specific liens arise, it is necessary to point out certain rules by which they are generally affected, and to explain the nature and incidents of the possession which is essential to their validity, and by the loss or abandonment of which they are destroyed.

Chattel must
belong to
debtor in
same
character
as that in
which debt
is owing.

585. The property upon which the lien is claimed, must belong to the person against whom it is claimed, in the same character in which the debt is owing. A banking firm, therefore, cannot retain a balance due to them from one of the partners, to answer a debt due to them from another firm of which that partner is a member (*c*). And if a member of a firm give a security upon property to his bankers, for money lent to him upon his separate credit, the bankers have no lien on the security for the general balance due from the firm, when the firm becomes entitled to the property (*d*).

Possession
essential to
validity of
lien.

586. Possession of the property is as essential to the validity of a general as of a special lien. So that a vendor may stop goods *in transitu*, if they have not come to the possession of the consignee, though, in consideration of the consignment, the latter have accepted bills drawn by the consignor, and have paid freight or other charges on the goods (*e*). The agreement under which he has done so, is merely executory and the subject of an action. The result will be the same if the consignor, in breach of his agreement, consign the goods to another person, who transmits them to him who was originally named as consignee, as the agent of the actual consignee (*f*). But it seems that if the goods come to the consignee's hands, the lien will hold in respect of payments

(*a*) *Gladstone v. Birley*, 2 Mer. at p. 403, per Sir W. GRANT; *Molesworth v. Robbins*, 2 Jo. & Lat. 358; *Pelly v. Wathen*, 1 De G. M. & G. 16; *Bozon v. Bolland*, 4 Myl. & Cr. 354.

(*b*) *Jacobs v. Latour*, per BEST, C.J., 5 Bing. 130; *Scarfe v. Morgan*, 4 Mee. & W. 270; *Rushforth v. Hadfield*, 6 East, 519; *Gladstone v. Birley*, 2 Mer. 401.

(*c*) *Watts v. Christie*, 11 Beav. 546; see *Ryall v. Rolle*, 1 Atk. 165, 184.

(*d*) *Exp. M'Kenna, The City Bank Case*, 7 Jur. (N.S.) 588.

(*e*) *Kinloch v. Craig*, 3 T. R. 119, 783.

(*f*) *Bruce v. Wail*, 3 Mee. & W. 15.

and acceptances made before notice of the consignor's death or insolvency, though the goods be not received till after that event (*g*). Paragraphs 586—587

587. To sustain a possessory lien, the property must have come to the hands of the claimant in the ordinary course of dealing, and not for any special purpose, or subject to any special legal consequence which may be inconsistent with the claim. If it was received in the ordinary course of business, the fact that, without his knowledge, it bore a pirated trade mark, is not destructive, of his claim (*h*). But no lien will arise where the possession was obtained without authority, or by fraud, misrepresentation or other wrongful act (*i*); not even to secure payments made in respect of the goods by the person who has so obtained them (*k*); nor where there has been a wrongful detainer, in respect of a claim which arose after the detainer became wrongful (*l*); nor where the goods were deposited for safe custody only, and without a special contract for a lien (*m*), or for a special purpose or subject to a direction to pay the proceeds of the sale to a particular account (*n*). In the case of a banker, no lien will attach upon exchequer bills delivered to him for the special purpose of receiving the interest on them and exchanging them for new bills (*o*), though it be usual for bankers to perform that duty for their customers; nor upon securities casually left with a banker (*p*); and the mere holding of goods by an agent will confer no lien, if by the terms of the contract, by his own permission, or by legal construction, his possession is that of his principal (*q*). So if goods be purchased by a factor, and be left by agreement in the hands of the vendor, in whose hands the principal exercises acts of dominion over them, the possession is clearly in him; and the factor cannot acquire a lien by taking possession after the bankruptcy of the principal (*r*). Again, possession delivered by a carrier, under the order of the shipper given after his bankruptcy, to a factor who has no right by special agreement or by possession of the bill of lading or otherwise to require delivery, will give the factor no lien, though the goods were shipped on his account, and even though he have

(*g*) *Hammonds v. Barclay*, 2 East, 226; but the consignor's executors confirmed the consignment.

(*h*) *Moet v. Pickering*, 8 Ch. D. 372.

(*i*) *Madden v. Kempster*, 1 Camp. 12; *Griffiths v. Hyde*, Selw. N. P. 1390, ed. 11; *Taylor v. Robinson*, 2 Moo. 730; *Exp. Oursell*, Amb. 297.

(*k*) *Lempriere v. Pasley*, 2 T. R. 485; *Ayling v. Williams*, 5 Car. & P. 399.

(*l*) *Exp. White*, 3 Mont. D. & De G. 436.

(*m*) *Muir v. Fleming*, Dowl. & Ry. N. P. C. 29; see *Hartop v. Hoare*, 3 Atk. 44; *Walker v. Birch*, 6 T. R. 258; *Re Cullen*, 27 Beav. 51.

(*n*) *Holroyd v. Griffiths*, 3 Drew. 428.

(*o*) *Brandao v. Barnett*, 12 Cl. & F. 787; *Leese v. Martin*, L. R. 17 Eq. 224.

(*p*) *Lucas v. Dorrien*, 7 Taunt. 278.

(*q*) *Hoggard v. Mackenzie*, 25 Beav. 493.

(*r*) *Taylor v. Robinson*, 2 Moore, 730.

Chattels must have come to hands of creditor in ordinary course of dealing.

Paragraphs
587—589

accepted bills on the faith of the consignment (*s*). And as to the effect of a contract, if factors sign a special receipt for goods delivered to them for sale, by which they undertake to pay the proceeds to the principal or his order, the goods if not sold must be returned to the principal (*t*). But a lien may arise if the chattel be allowed to remain in the hands of the deposittee after failure of the special purpose for which it was delivered (*u*).

Possession of
creditor need
not be
corporeal.

588. Neither the possession which is necessary to support (*x*) nor that which is sufficient to defeat (*y*) a lien, need be of a corporeal kind (**1623**). The principal may have a lien by virtue of the possession of his agent (*z*); and the lien will arise if the goods have been received, and an act of ownership exercised, as by paying for warehouse room or taking samples, measuring and marking the goods, or expending money in labour on them. But the possession is not considered to be vested in a factor by the mere payment by him of freight (*a*). The right of possession conferred by a possessory lien, will support an action founded upon an alleged ownership in the person claiming the lien (*b*).

Possession
must be
continuous.

589. The possession must be continuous (**1590**); there can, therefore, be no lien where, by the nature of the contract between the owner of the property and the holder, it is received subject to the owner's right of disposition. Hence the agister of cattle, not having entire possession of them, cannot retain them (*c*) in respect of the agistment; nor the stable keeper, horses left in his charge, for their keep, or for labour or money bestowed upon them, though at the owner's request (*d*); for he takes them upon the terms that the owner is to have the control and right of possession and use at his pleasure, which is inconsistent with the nature of a lien. This reason, however, will not affect the lien of an innkeeper, to whose stable a horse is brought by a guest, and occasionally removed by him for his use or pleasure with the intention of returning it; because the original contract under which it was left is presumed

(*s*) *Nichols v. Clent*, 3 Price, 547.

(*t*) *Walker v. Birch*, 6 T. R. 258.

(*u*) *Exp. Pemberton*, 18 Ves. 282.

(*x*) *Bull v. Faulkner*, 2 De G. & Sm. 772.

(*y*) *Wright v. Lawes*, 4 Esp. 82; *Cooper v. Bell*, 3 H. & C. 722.

(*z*) See *Belcher v. Oldfield*, 6 Bing. N. C. 102.

(*a*) *Kinloch v. Craig*, 3 T. R. 119, 783. It was held that a shipwright, whose graving flat was attached and floated close to the ship, to enable his workmen to repair her, and who had tools and materials on board, had not sufficient possession to support a lien. (*The Scio*, L. R. 1 Ad. & E. 353.)

(*b*) *Legg v. Evans*, 6 Mee. & W. 36; *Rogers v. Kennay*, 9 Q. B. 592.

(*c*) *Chapman v. Allen*, Cro. Car. 271; *Jackson v. Cummins*, 5 Mee. & W. 342; *Hobby v. Ruell*, 1 Car. & K. 716.

(*d*) *Chapman v. Allen*, Cro. Car. 271; *Wallace v. Woodgate*, 1 Car. & P. 575; *Bevan v. Waters*, 3 Car. & P. 520; *Judson v. Etheridge*, 1 Cr. & M. 743; *Orchard v. Rackstraw*, 9 C. B. 698.

to continue unless there is evidence that it has been changed (e) *Paragraphs*
(607). 589—591

590. It was formerly considered that there could be no lien where a special contract was made for a reasonable or absolutely fixed price for the work or other consideration in respect of which the lien was claimed (f). But it has long been established, that a lien may arise under such a special agreement, as well as where the contract to pay a reasonable price is only implied, provided the special agreement contain no stipulation which is inconsistent with the nature of a lien (g). Such a stipulation is found in the contract made with a livery stable keeper for the care of a horse, which is to be delivered to the owner for his use whenever he may require it. So it is where chattels are sold for payment at a future time. "If I buy of you a horse for 20s.," says *Haydon, J.*, "you retain the horse till you be paid the 20s. ; but if I am to pay you at Michaelmas next ensuing, you may not detain the horse until you be paid" (h). For on the sale of a chattel, where no day of payment is fixed, payment of the price and delivery are concurrent acts ; but where a future day is fixed for payment, the vendor not keeping possession can have no lien. So where credit is given for work to be done upon a chattel, the workman has no possessory lien (i). However, if a vendor retains goods after the expiration of the period of credit, his lien revives (k).

Lien may arise were special contract, which is not inconsistent with lien.

Agreement to give credit.

An implied contract to pay a reasonable sum for a service, which it has been attempted by fraud to obtain without payment, will be raised by law, and will carry a lien (l).

591. Where the holder of property holds it as agent for another, who claims a lien, he must be able to show an authority for doing so ; if he cannot, the other will lose his lien for want of possession ; and the actual holder, having no lien, will be responsible to the owner, if, after demand by him, he part with the goods to the creditor. He cannot detain them by virtue of a mere authority from the latter to receive payment of the debt (m).

Where no corporeal possession by creditor, he must show that actual possessor is his agent.

A lien may arise against the owner of a chattel by the act of an agent done within the scope of his authority ; as where a tailor

(e) *Allen v. Smith*, 9 Jur. (N.S.) 1284.

(f) See *Brenen v. Currant*, Bac. Abr. Trover, E. 819.

(g) *Chase v. Westmore*, 5 Mau & S. 180 ; *Crawshaw v. Homfray*, 4 B. & Ald. 50 ; *Scarfe v. Morgan*, 4 Mee. & W. 270 ; per GIBBS, C.J., in *Hutton v. Bragg*, 7 Taunt. 14 ; see *Jones v. Peppercorne*, Johns. 430 ; *Fisher v. Smith*, 4 App. Cas. 1 ; *Exp. Willoughby, Re Westlake*, 16 Ch. D. 604.

(h) *Hostiler*, ac. sur le cas, cited Year Book, 5 Edw. 4 E. T., pl. 20.

(i) *Raitt v. Mitchell*, 4 Camp. 146.

(k) Sale of Goods Act, 1893, s. 41, sub-s. (1) (b).

(l) *Rumsey v. North Eastern Rail. Co.*, 14 C. B. (N.S.) 641.

(m) *Exp. Grove*, 3 Bing. N. C. 304.

Paragraphs
591—595

receives from a servant cloth for liveries ; although the agent could not acquire a lien by paying the debt (*n*).

No lien on
chattels in
hands of
officer of the
court.

592. A lien does not attach upon documents or other chattels in the hands of a person as officer of a court of justice ; such as the records of court in the hands of a clerk of assize (*o*) ; proceedings in bankruptcy in the hands of a clerk of enrolments (*p*) ; or of the solicitor in the bankruptcy (*q*) ; or in the hands of the bankrupt's solicitor (*r*) ; or on the books of account of a bankrupt (*s*) ; or upon a dividend on his estate in the hands of the trustee (*t*) ; or upon his estate in the hands of a receiver or manager in the bankruptcy (*u*) ; or upon his certificate (*x*) ; or upon his papers delivered after an act of bankruptcy to his solicitor (*y*). But this rule does not affect the right of the solicitor in a bankruptcy to his ordinary lien upon documents not belonging to the estate upon which he has expended his own labour or money (*z*).

Documents
on which
there is no
lien.

593. The solicitor of the official liquidator of a joint stock company, has also no lien for his costs upon the proceedings in the winding up (*a*) ; nor the commissioners upon a commission of partition (*b*) ; though barristers have been held to be justified in refusing to produce evidence taken under a commission, until payment of their fees (*c*). There can also be no lien upon an original will (*d*), or upon the certificate of registry of a British merchant ship (*e*) (**636**).

Person
entitled to
lien cannot
add ware-
house
charges.
Lien on
money.

594. A possessory lien does not extend to charges for holding the chattel during its detention by virtue of the lien (*f*).

595. The possessory lien upon money, as distinguished from the lien upon other personal chattels, is divisible, and extends only to so much of it as equals the amount of the debt (*g*).

(*n*) *Hussey v. Christie*, 9 East, 426, per LORD ELLENBOROUGH.

(*o*) *The King v. Bury*, 1 Leach, Cr. Ca. 201.

(*p*) *Exp. Sanderson*, 19 Ves. 161.

(*q*) *Exp. —*, 1 Rose, 207.

(*r*) *Exp. Hardy*, 1 Rose, 395. Where the bankruptcy has been superseded, *query* ; see *Exp. Shaw*, Jac. 270.

(*s*) General Rules in Bankruptcy, 1870, r. 110.

(*t*) *Exp. White*, 1 Atk. 90.

(*u*) General Rules in Bankruptcy, 1871, r. 3 ; *Exp. Browne, Re Maltby*, 16 Ch. D. 497.

(*x*) *Anon.*, 1 Russ. & Myl. 330.

(*y*) *Exp. Lee*, 2 Ves. Jun. 285.

(*z*) *Exp. Yalden, Re Austin*, 4 Ch. D. 129.

(*a*) *Re Union Cement & Brick Co., Exp. Pullbrook*, L. R. 4 Ch. 627.

(*b*) *Young v. Sutton*, 2 Ves. & B. 365.

(*c*) *Smith v. Hallen*, 2 Fost. & F. 678 ; *Peters v. Beer*, 14 Beav. 101.

(*d*) *Georges v. Georges*, 18 Ves. 294 ; *Lord v. Wormleighton*, Jac. 580 (as to solicitor), per LORD ELDON ; *Balch v. Symes*, Turn. & Russ. 87 ; see *Exp. Law*, 2 Ad. & El. 45.

(*e*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 15 ; *The St. Olaf*, 3 Asp. M. C. 268 ; *The Celtic King*, [1894] P. 175.

(*f*) *British Empire Shipping Co. v. Somes*, El. Bl. & El. 353.

(*g*) *Miller v. Atlee*, 3 Ex. 799, per POLLOCK, C.B.

SECTION II.

Paragraphs
596—597

Of General Liens.

PARAGRAPH.

<i>In certain trades general liens recognized by law, but in all other strict evidence of custom required</i>	596
<i>Where lien judicially recognized claimant must have acted in favoured character</i>	597
<i>Where lien exists by custom all who deal with persons following that trade contract on footing of lien</i>	598
<i>Lien by agreement</i>	599
<i>Lien allowed even where debt statute barred</i>	600
<i>Rights of strangers unaffected by general lien</i>	60
<i>Specific security is consistent with general lien</i>	602

596. In certain trades, in which it is usual for advances to be made by the agent to the principal, the right to a general lien has been long established and is admitted without further proof (*h*). But in no others is it allowed without strict evidence of general usage or course of dealing, or of special agreement; to which a general resolution by persons claiming the lien, that they will only receive the goods of those who deal with them subject to the lien, is equivalent, as against persons who have notice of the resolution; at least in those cases in which it is optional with the person insisting upon the lien to receive the goods, and not compulsory as in the case of an innkeeper (*i*). But the lien will not be extended beyond the strict terms of the notice (*k*).

597. Nor in those cases in which this form of lien is judicially recognized, is it sufficient that the claimant follows the trade of which the lien is admitted to be a privilege. It is also necessary that, in the very transaction out of which the claim arises, he shall have acted in the favoured character. So that if a person, who acts both as a factor and an insurance broker, effects a policy for a firm with which he has had transactions in both characters, and the evidence shows that he effected it as an insurance broker, he cannot claim for a general balance due to him as a factor (*l*). And the general lien of a factor does not extend to a debt for the purchase-money of goods sold by him to the employer before the employment as factor (*m*); because the demand did not arise out of a course of dealing in that relation.

(*h*) *Bock v. Gorrisen*, 2 De G. F. & J. 434.

(*i*) *Kirkman v. Shawcross*, 6 T. R. 14.

(*k*) *Cumpston v. Haigh*, 2 Bing. N. C. 449.

(*l*) *Dixon v. Stansfield*, 10 C. B. 398; and a solicitor having a lien on documents as solicitor cannot extend the lien so as to cover money owing to him as land agent of the client: *Re Walker, Meredith v. Walker*, 68 L. T. 517; or anything except taxable costs, charges, and expenses; *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590.

(*m*) *Houghton v. Matthews*, 3 Bos. & P. 485.

Paragraphs
598—602

Where lien
exists by
custom all
who deal
with persons
following that
trade contract
on footing of
lien.

Lien by
agreement.

Lien allowed
even where
debt statute
barred.

Rights of
strangers
unaffected by
general lien.

Specific
security
inconsistent
with general
lien.

598. If a general usage be shown that a lien for a general balance shall be enjoyed by a particular trade, all who deal with persons following that trade, are supposed to contract on the footing of the general practice, and to adopt the general lien into the particular contract (*n*).

599. The goods upon which the lien is claimed, must also be within the terms of the agreement, construed according to the general law concerning liens. Where it was agreed that all goods "on hand" should be subject to a lien for a general balance, it was held that goods deposited with the claimant to be used by *the owner* in the process of manufacture were not subject to the lien, which was confined to those upon which the labour of the claimant was employed (*o*).

600. The general lien will cover a debt, the direct remedy for which has been barred by the Statute of Limitations (*p*).

601. The rights of strangers cannot be affected by a general lien (*q*). A warehouse keeper, therefore, cannot claim a lien on goods housed in his warehouse for and in the name of (but not necessarily belonging to) the persons by whom the warehouse keeper is employed, for balances due from them; for, by such a custom, the goods of foreign merchants would become liable to the private debts of the factor, previously incurred, in respect of goods of other persons, and to an unlimited extent (*r*). The like has been held in the case of a carrier, as regards a claim for a lien against the true owner of the goods, for the general balance due from the factor to whom the goods were consigned for sale (*s*). And if a lien have once attached, even a verbal notice of the cesser of interest of the owner of the property will prevent its extension against him. The lien of a wharfinger was therefore held to be limited to charges incurred in respect of goods prior to the date of a verbal notice of their sale, though no delivery order had been served (*t*).

602. The deposit of property as security for a specific part of a debt, is inconsistent with a general lien (*u*); and a consignee who has accepted the consignment, cannot set up a general lien, in opposition to the positive directions of the consignor for the disposal of the property (*x*).

(*n*) *Rushforth v. Hadfield*, 6 East, 519, *per* Lord ELLENBOROUGH.

(*o*) *Cumpston v. Haigh*, 2 Bing. N. C. 449.

(*p*) *Spears v. Hartley*, 3 Esp. 81; *Morse v. Williams*, 3 Camp. 418.

(*q*) *Oppenheim v. Russell*, 3 Bos. & P. 42; *Wright v. Snell*, 5 B. & Ald. 350.

(*r*) *Leuckhart v. Cooper*, 3 Bing. N. C. 99.

(*s*) *Wright v. Snell*, 5 B. & Ald. 350; *Richardson v. Goss*, 3 Bos. & P. 119.

(*t*) *Barry v. Longmore*, 12 Ad. & E. 639.

(*u*) *Exp. Vere, Re Bentley*, 4 Deac. & C. 295.

(*x*) *Frith v. Forbes*, 4 De G. F. & J. 409.

SECTION III.

Of the Particular Debts for which Possessory Liens may be Claimed.

PARAGRAPH

<i>Enumeration of debts for which liens may be claimed</i>	603
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SUB-SECTION (1).—*The Lien of the Vendor of Chattels.*

<i>General nature of vendor's lien</i>	604
<i>No lien for charges to which goods are liable at date of sale</i>	605
<i>Lien of vendors chatte^ls</i>	606

SUB-SECTION (2).—*The Lien for Supplies or Services under Legal obligations; and herein of the Liens of Innkeepers, Carriers, Shipowners, and others.*

<i>Innkeeper's lien</i>	607
<i>Carrier's lien</i>	608
<i>Shipowner's lien on passengers' goods and on cargo</i>	609
<i>No lien in respect of dead freight</i>	610
<i>Right to lien under contracts by way of charter-party</i>	611
<i>Shipowner's lien does not arise for money payable under special contract not being strictly "freight"</i>	612
<i>Goods once shipped, need not be re-delivered without payment of freight, unless goods sent in bond without notice of charter-party</i>	613
<i>Distinction between lump sum for entire freight, and freight calculated at a certain rate on cargo</i>	614
<i>Agreement between consignee's or charterer's agent and third parties with notice of shipowner's claim will not affect his lien</i>	615
<i>No lien for charges properly payable by owner but which freighter has agreed to pay</i>	616
<i>Master of ship has lien for freight and general average</i>	617
<i>Lien not lost by warehousing the goods with notice</i>	618
<i>Lien on warehoused goods lost by production to warehouseman of receipt for debt or by deposit of the amount claimed</i>	619
<i>If lien not discharged, warehouseman to sell after certain period</i>	620
<i>Warehouseman entitled to rent, etc., and to have lien for same</i>	621
<i>Statutory savings for rights of warehouseman, etc.</i>	622

SUB-SECTION (3).—*The Lien for Labour upon Chattels.*

<i>Liens for labour performed at request of owner</i>	623
<i>Lien only relates to the chattel on which the labour is expended</i>	624
<i>Lien attaches to each of several chattels even although they belong to different owners</i>	625
<i>Lien of partners where one is part owner of chattel</i>	626
<i>Enumeration of specific liens in particular trades</i>	627
<i>Salvage of property endangered by sea, etc.</i>	628
<i>A general lien for labour is exceptional</i>	629
<i>Instances of general liens for labour</i>	630

SUB-SECTION (4).—*The Lien of Solicitors upon Documents.*

<i>General liens on clients' documents</i>	631
<i>Strictly limited to professional matters</i>	632
<i>Lien of London agent against country solicitor</i>	633
<i>Lien where firm has been changed</i>	634

Paragraph
603

SUB-SECTION (4)—*The Lien for Labour upon Chattels (continued)*—

	PARAGRAPH
<i>No general lien where purposes of deposit special</i>	635
<i>Lien extends only to interest of client depositing the documents</i>	636
<i>Exceptions</i>	637
<i>Lien is subject to other parties' rights</i>	638
<i>Only exists where employment was proper, and only as against persons employing and those claiming under them</i>	639
<i>Mortgagee's solicitor has no lien against mortgagor</i>	640
<i>As to solicitor acting for both parties</i>	641
<i>No lien can be created by an act which would be a breach of duty</i>	642
<i>As to solicitor's rights after satisfaction of the mortgage</i>	643
<i>Whether husband's solicitor has lien against trustees of marriage settlement</i>	644
<i>Solicitor's right when he discharges himself</i>	645
<i>When he is discharged</i>	646
<i>Old solicitor cannot suspend the suit if he fails to deliver his bill</i>	647
<i>He may have to produce the documents without prejudice to his lien</i>	648
<i>The document will be rendered safe if it be in danger</i>	649
<i>Lien may not impede the proceedings</i>	650
<i>No lien where infant plaintiff repudiates when adult</i>	651
<i>Different rights where documents are deposited for purposes of suit only, and where held for other purposes</i>	652
<i>As to party ordered to produce where solicitor claims lien</i>	653
<i>Where deeds belong to a trust</i>	654
<i>Where to a lunatic</i>	655
<i>Court reluctant to exercise summary jurisdiction in cases of lien</i>	656
<i>Court has power, where taxation permitted, to order delivery of bill and of documents</i>	657
<i>Statutory provision as to companies ordered to be wound up</i>	658
<i>Solicitor taking security prima facie abandons lien</i>	659

SUB-SECTION (5).—*The Liens of Factors, Brokers, Bankers, and other Agents.*

<i>Agents have particular but not general lien</i>	660
<i>Lien of trustee who carries on trade, and rights of creditors by subrogation</i>	661
<i>Lien of agent on proceeds of contract</i>	662
<i>Lien of ship's husband and master</i>	663
<i>Lien of agents for disbursements</i>	664
<i>Lien of consignee for advances</i>	665
<i>Lien of factor for price of goods bought by him under salvage customs and freight</i>	666
<i>Lien of wharfinger for general balance</i>	667
<i>Liens of brokers</i>	668
<i>Lien of insurance broker</i>	669
<i>Lien of banker and persons who have made advances on bills</i>	670
<i>General lien of banker on papers and cash balance of customer</i>	671
<i>Banker's lien does not apply where property only held by customer as trustee</i>	672
<i>Banker's lien does not apply to property deposited by way of security for specific sum</i>	673

Enumeration
of debts for
which liens
may rise.

603. A possessory lien entitles the holder of a personal chattel to detain it—

- (1.) For the unpaid price of a chattel sold (**604**).
- (2.) For the cost of supplies furnished, or services rendered, in discharge of the obligation imposed by law upon persons who follow certain callings (**607**).

SUB-SECTION (1.)—*The Lien of the Vendor of Chattels.*Paragraphs
604—606

604. The lien of the vendor of chattels for the purchase-money, arises out of his original ownership and dominion over the property (*y*), and is independent of actual possession by the vendor, so long as actual possession has not been obtained by the vendee; differing in this respect from other possessory liens, the claimants of which have no other title than the possession of the chattel upon which the lien is claimed. The benefit of the vendor's lien extends to factors and brokers, or persons who buy for others at their own risk, drawing bills upon them for the value of the goods and the commission (*z*), or paying the purchase money to the vendors; it carries with it a right (which belongs to no other kind of lien (*a*)) to stop the goods *in transitu* before they are delivered to the purchaser; of which hereafter (**1601**): and it overrides any lien which may exist against the purchaser, and also against a sub-purchaser from him, though the former may have been paid by the sub-purchaser (*b*).

General
nature of
vendor's lien.

605. Where goods purchased, are subject to charges payable at a future time, whether delivered or not, so that at the time of sale there is no lien for those charges, the lien will not arise (*c*) against the purchaser in consequence of default in payment of the charges at the proper time. And if the purchaser of a chattel detained for a lien, pay the demand, after giving notice to the vendor, he may recover (*d*) the amount from the latter. The lien extends to duties which the purchaser has agreed to pay in respect of the chattels, but which have been paid by the vendor, in discharge of his liability to the crown (*e*).

No lien for
charges to
which goods
are liable at
date of sale.

606. The law relating to the lien of the unpaid vendor of goods, which means "all chattels personal other than things in action and money (and in Scotland all corporeal movables except money), as well as emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale" (*f*), is summarized in the Sale of Goods Act, 1893, the material sections of which are as follows:—

Liens of
vendors of
chattels.

39.—(1.) Subject to the provisions of this Act, and any statute in that behalf, notwithstanding that the property in the

(*y*) *Bloxam v. Sanders*, 4 B. & C. 941, per BAYLEY, J.; *Dodsley v. Varley*, 12 Ad. & E. 632, per Lord DENMAN; *Grice v. Richardson*, 3 App. Cas. 319; *Swan v. Barber*, 5 Ex. D. 130.

(*z*) *Drinkwater v. Goodwin*, 1 H. Cowp. 251; *Feise v. Wray*, 3 East, 93; *Imperial Bank v. London and St. Katherine Docks Co.*, 5 Ch. D. 195.

(*a*) Per EYRE, C.B., in *D. P. Kinloch v. Craig*, 3 T. R. at p. 787.

(*b*) *Dixon v. Yates*, 5 B. & Ad. 313.

(*c*) *Crawshay v. Homfray*, 4 B. & Ald. 50.

(*d*) *Bevan v. Waters*, 3 Car. & P. 520.

(*e*) *Winks v. Hassall*, 9 B. & C. 372.

(*f*) Sale of Goods Act, 1893, s. 62.

Paragraph
606

goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a) A lien on the goods or right to retain them for the price while he is in possession of them ;
- (b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them ;
- (c) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

41.—(1.) Subject to the provisions of this Act the unpaid seller of goods who is in possession of them, is entitled to retain possession of them until payment or tender of the price, in the following cases, namely :—

- (a) Where the goods have been sold without any stipulation as to credit ;
- (b) Where the goods have been sold on credit, but the term of credit has expired.
- (c) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42. Where an unpaid seller has made part delivery of the goods he may exercise his right of lien or retention, on the remainder ; unless such part delivery has been made under such circumstances, as to show an agreement to waive the lien or right of retention.

43.—(1.) The unpaid seller of goods, loses his lien or right of retention thereon—

- (a) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer, without reserving the right of disposal of the goods ;
- (b) When the buyer, or his agent, lawfully obtains possession of the goods ;
- (c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention, by reason only that he has obtained judgment or decree for the price of the goods.

SUB-SECTION (2).—*The Lien for Supplies or Services under Legal Obligations, and herein of the Liens of Innkeepers, Carriers, Shipowners and others.* Paragraph
607

607. To the innkeeper and the carrier a specific lien is given by law, in respect of their obligation to perform the duties of their respective callings (*g*); to the latter against the particular goods, which he transmits for a reasonable reward to be paid for the carriage of them; and to the former against the chattels of his guest for his board and expenses at the inn. The lien of the innkeeper (in which term is included every person who provides accommodation for such travellers and sojourners as are able to pay for it a reasonable compensation, whether his inn is or is not frequented by public conveyances or furnished with stables (*h*)), arises only where the owner of the goods upon which the lien is claimed is the innkeeper's guest. He has, therefore, no lien for the keep of a horse or the standing-room of a carriage (*i*) left with him by a person who, at the time of leaving them, was not his guest; nor will the lien arise in such a case because the owner afterwards becomes an occasional guest at the inn (*k*). But, for the keep of horses brought by a guest to his inn, even though they be occasionally removed, provided the removals be with an intention to return, the innkeeper has a lien (*l*). The rights of an innkeeper in respect of his lien are so extensive that he may detain property brought by a guest who is not the lawful owner of it, even though it be stolen (*m*); and *à fortiori* where the guest is merely a bailee of it (*n*). So he may claim a lien on goods which are the separate property of a married woman who comes to the inn with her husband, for the latter's debt (*o*), and on the samples of a manufacturer for the debt of his commercial traveller (*p*); and the fact that he knew that the traveller was a commercial showing round another's goods, is immaterial, if the goods were received as part of the traveller's baggage (*p*); provided that at the time of the

(*g*) *Naylor v. Mangles*, 1 Esp. 109; *Rushforth v. Hadfield*, 6 East, 519; 7 East, 224. In *Mulliner v. Florence* (3 Q. B. D. 484) it was said that the innkeeper's lien is general. BRAMWELL, L.J., referred to the case of 50 pieces of cloth sent to a dyer under one contract. He of course has a lien upon all the pieces for the cost of dyeing all and each of them, according to the principle laid down in par. 625; and so the innkeeper has a lien on all the guest's chattels for all his expenses. But this is not a general lien properly so called, which is defined in par. 584.

(*h*) *Thompson v. Lacy*, 3 B. & Ald. 283.

(*i*) *Binns v. Pigot*, 9 Car. & P. 208. Though it has been held that by the mere leaving a horse the person who left it became a guest. *York v. Grindstone*, 1 Salk. 388.

(*k*) *Smith v. Dearlove*, 6 C. B. 132.

(*l*) *Allen v. Smith*, 12 C. B. (N.S.) 638.

(*m*) *Yorke v. Grenough*, 2 Lord Raym. 866; *Johnson v. Hill*, 3 Stark. 172; *Robinson v. Walter*, 3 Bulst. 269; *Turrill v. Crawley*, 13 Jur. 878; *Snead v. Watkins* 1 C. B. (N.S.) 267.

(*n*) *Cooke v. Kane*, 57 Amer. Reps. 28.

(*o*) *Gordon v. Silber*, 25 Q. B. D. 491.

(*p*) *Robins v. Gray*, [1895] 2 Q. B. 501.

Paragraphs
607—608

deposit the innkeeper had no notice of the wrongful nature of the possession.

The lien extends to goods which the innkeeper has received and kept for the guest, whether or not he was bound by law to receive them (*q*).

The innkeeper is not bound, where the guest is possessed of his reason, and is not an infant, to inquire into the necessity or propriety of the supplies to him, in respect of which the lien is claimed (*r*). But it seems he cannot claim a lien for money lent to the guest, except by special agreement made at the time of the advance (*s*).

Neither the lien of the innkeeper nor that of the carrier extends to the body of the guest or passenger, or to the clothes upon his person (*t*) (931).

Carrier's
lien.

608. The carrier, undertaking and being bound by law to receive and carry for a reasonable reward the goods of all persons indifferently, his lien for the carriage extends, as in the case of the innkeeper, to stolen goods delivered to him in the way of his trade; provided that at the time of the delivery he had no notice of the wrongful title (*u*). The carrier's lien only applies to the price of the carriage. When an attempt was made to extend it to charges for booking and warehouse room, it was said there was no lien for such charges (*x*), though in the particular case they were not actually due. But, having regard to the duty cast on railway companies by modern legislation, there is now a lien for cloak room charges which will prevail against the true owner of the goods, although they were deposited by a mere hirer (*y*). And upon clear proof of usage, or of special notice or agreement, the carrier may have a lien for his general balance (*z*) (596—600).

If, by the custom of a particular trade, the carrier is paid by the consignor, he has no lien on the goods, as against the consignee, for

(*q*) *Threfall v. Borwick*, L. R. 7 Q. B. 711; L. R. 10 Q. B. 210; notwithstanding *Broadwood v. Granara*, 10 Ex. 417.

(*r*) *Proctor v. Nicholson*, 7 Car. & P. 67.

(*s*) *Id.*

(*t*) *Wolf v. Summers*, 2 Camp. 631; *Sunbolf v. Alford*, 3 Mee. & W. 248. By an old statute any innkeeper, alehouse keeper, victualler, sutler, or other retailer who should sell ale or beer in a vessel not signed, stamped or marked according to the Act, or who, in giving any account or reckoning in writing or otherwise, should refuse or deny to give in such account the particular number of quarts or pints of ale or beer for which demand was made, was forbidden for default of payment of the reckoning to detain any goods or other things belonging to the person from whom the reckoning should be due. 11 & 12 Will. 3, c. 15, s. 2. Rep. 30 & 31 Vict. c. 59.

(*u*) *The Exeter Carrier's Case*, cited by HOLT, C.J., 2 Lord Raym. 867.

(*x*) *Lambert v. Robinson*, 1 Esp. 119.

(*y*) *Singer Manufacturing Co. v. L. & S. W. Ry. Co.*, [1894] 1 Q. B. 833. Applied in *Keene v. Thomas*, [1905] 1 K. B. 136.

(*z*) *Rushforth v. Hadfield*, 6 East, 519; 7 East, 224; *Aspinall v. Pickford*, 3 Bos. & P. 44, n.

the consignor's general balance; because the property is vested in the consignee upon delivery to the carrier (*a*). Paragraphs
608—610

It has also been held that a stage coachman has not the privilege of a carrier, unless he takes a distinct price for the carriage of the goods as well as of passengers (*b*), and the same principle applies to a furniture remover, who has not the privileges of a Common Carrier (*c*).

609. The shipowner, like any other carrier, is entitled by law to a lien upon his passenger's goods, including personal luggage, for his passage money (*d*); and upon the goods carried in the ship (so long as they remain undelivered (*e*)), as security for the freight or reward which becomes payable upon the delivery and for the safe carriage of the goods, but not in case of their loss (*f*). And if the contract for delivery be completed, so far as the shipowner is concerned, but actual delivery is prevented by circumstances arising out of the nature of the cargo, a lien enforceable *in rem* in the Admiralty Division, arises for the cost of storing and bringing them back to the port of shipment (*g*). Shipowner's
lien on
passenger's
goods and
cargo.

The lien binds every part of the cargo in the hands of a single consignee or purchaser (*h*); but if the cargo be sold to different persons, it will not bind the part delivered to one, for the freight of what has been delivered to another (*i*) (**624**).

610. The manner and time of payment for the hire of ships, and the conveyance of their cargoes, are, however, often the subject of special contracts, in which the word "freight" is not only used in the strict sense above mentioned, but is made to apply to money payable on taking goods on board to be carried on the voyage, and irrespective of the contingency of the ship's safe arrival; and also to the claim for loss of freight, which would have been payable in respect of such cargo as might have been carried by a partly laden ship, if she had been fully laden, and which is commonly known as *dead freight* (*k*). In respect of this, there is no lien by law; for no No lien in
respect of
dead
freight.

(*a*) *Butler v. Woolcott*, 2 Bos. & P. N. R. 64.

(*b*) *Middleton v. Fowler*, 1 Salk. 282.

(*c*) *Electric Supply Stores v. Gaywood*, 100 L. T. 855.

(*d*) *Wolf v. Summers*, 2 Camp. 631.

(*e*) *North v. Gurney*, 1 Johns. & H. 509.

(*f*) *How v. Kirchner*, 11 Moo. P. C. 21; *Kirchner v. Venus*, 5 Jur. (N.S.) 395.

(*g*) *The Argos, Cargo Ex.*, L. R. 4 Ad. & E. 13.

(*h*) *Sodergreen v. Flight*, cited 6 East, 622; *Perez v. Alsop*, 3 Fost. & F. 188.

(*i*) See *Bernal v. Pim*, 1 Gale, 17.

(*k*) *Phillips v. Rodie*, 15 East, 547; *Birley v. Gladstone*, 3 Mau. & S. 205, *per* Lord ELLENBOROUGH and LE BLANC, J.; *Gladstone v. Birley*, 2 Mer. 401; *Smith v. Sieveking*, 4 El. & Bl. at p. 952, *per* Lord CAMPBELL; *M'Lean v. Fleming*, L. R. 2 H. L. Sc. 128, *per* Lords CHELMSFORD and COLONSAY. The above is considered to be the result of the authorities as to the meaning given by the courts as to the term *dead freight*. In the case of *Gray v. Carr* (L. R. 6 Q. B. 522), several of the learned judges expressed opinions as to Lord ELLENBOROUGH's construction of the phrase, which appear to be at variance with his remarks in the first two cases

Paragraphs
610—612

goods being carried, there is nothing upon which the lien can attach (l). But by contract, there may be a lien for it on the cargo actually carried, if the amount be fixed or capable of calculation (m); and it seems, even if the amount be unliquidated (n).

Right to
lien under
contracts
by way of
charter-party.

611. The questions which usually arise as to the right to a lien under contracts by way of charter-party, are, whether they transfer the temporary ownership of a vessel to the charterer; and whether the delivery of the cargo is to precede, follow, or be coincident with the payment for the hire of the ship. As to the temporary ownership, the courts, (looking at the whole contract and the intention of the parties,) will not deprive the owner of his lien because of the use of particular words, which, taken alone, might seem to give the possession to the charterer; even where words of actual demise, such as “let” and “hire,” are found in the instrument (o). But where there are words large enough to import a demise, and the master is appointed by the charterer, who is responsible for him, and the master receives the freight on the charterer’s account, irrespective of the delivery of the cargo and of the payment of the hire of the ship; or where a clear intention to pass the possession to the charterer is otherwise shown; there can be no lien (p). A shipowner’s lien on freight in the hands of the ship’s agent for charter-party hire does not extend to hire not yet due but only to that accrued due when the lien is exercised (q).

If the shipowner retains possession of the ship, he has a lien for freight made payable either in cash, or by bills on the arrival of the ship, or on or before the delivery of the cargo (r). And if the freight be payable on the quantity safely delivered alongside, and a receipt to be granted on board, then, as the master would lose his lien on delivery and receipt, he may refuse to deliver except on daily payment of freight for the amount delivered (s).

Shipowner’s
lien does not
arise for

612. But the lien does not arise for money payable under a special contract, and not falling within the strict meaning of

cited: but with one exception they refrained from stating what they held to be its true meaning. By *BRAMWELL, B.*, it was said to mean in strictness an agreed sum fixed or capable of calculation, for short loading—but not to include short loading merely—excluding, therefore, it is presumed, unliquidated damages; which, as it appears to have been admitted by *WILLES, J.*, in *Pearson v. Goschen* (17 C. B. (N.S.) 352), were certainly included by Lord *ELLENBOROUGH*.

(l) *Phillips v. Rodie*, *supra*; *Gladstone v. Birley*, *supra*; *Birley v. Gladstone*, *supra*.

(m) *M’Lean v. Fleming*, *supra*.

(n) *Id.*, per Lords *CHELMSFORD* and *COLONSAY*.

(o) *Christie v. Lewis*, 2 Brod. & B. 410; *Saville v. Campion*, 2 B. & Ald. 503, overruling *Hutton v. Bragg*, 7 Taunt. 14.

(p) *Belcher v. Capper*, 4 Man. & Gr. 502; see *Newberry v. Colvin*, 7 Bing. 190, affirmed 1 Cl. & F. 283.

(q) *Wehner v. Dene Steam Shipping Co.*, [1905] 2 K. B. 92.

(r) *Tate v. Meek*, 8 Taunt. 280; *Saville v. Campion*, 2 B. & Ald. 503; *Campion v. Colvin*, 3 Bing. N. C. 17; *Faith v. East India Co.*, 4 B. & Ald. 630; *Paynter v. James*, L. R. 2 C. P. 348, aff. 18 L. T. (N.S.) 449.

(s) *Black v. Rose*, 2 Moo. P. C. (N.S.) 277.

freight, as a reward for the safe conveyance and *delivery* of goods ; unless, by the terms of the contract, rights are created corresponding to the lien given by law. If no such rights be created none will be implied by law.

Paragraphs
612—614

money payable under special contract not being strictly "freight."

This rule excludes the lien when the money is made payable irrespective of the arrival of the ship, and the safe delivery of the goods, whether it be before the arrival of the ship at the port of discharge (*t*), or after the delivery of the goods (*u*) ; and although the money be made payable to a person other than the shipowner, who may have made advances on account of the (*quasi*) freight.

Goods once shipped need not be re-delivered without payment of freight unless goods sent on board without notice of charter-party.

613. The goods having been shipped for delivery according to the contract, the shipowner has a right to earn his freight, and for that purpose he may refuse to re-deliver them to the charterer until payment of the freight which might have been earned, and until indemnity be given against the consequences arising from any dealings with the bill of lading signed by the master. And these conditions must be performed before the contract, (which can only be dissolved by the consent of both parties,) can be determined (*x*). This rule appears to be equally applicable to cases in which there is, as to those in which (as happened in the cases cited) there is not, a lien under the contract for the freight. But it does not apply if, the ship having been advertised as a general ship, the goods were sent on board without notice of any charter-party. In such a case, if the shipper, after notice of the charter-party, refuses to submit to its terms, and has not been guilty of *laches*, the shipowner cannot retain the goods (*y*).

Distinction between lump sum for entire freight or freight calculated at a certain rate on cargo.

614. Where a charter-party is entered into, under which the shipowner has a lien for a lump sum for freight against the charterer, the lien holds good against goods shipped on account of the charterer, as against an endorsee of the bill of lading for valuable consideration, with notice of the charter-party (*z*). But where the charter-party specifies only a certain rate of freight on the cargo to be carried, the owner's lien is only for the freight due at that rate on the particular goods, and not for the whole balance of freight (*a*). If the master has signed a bill of lading for less freight than is

(*t*) *How v. Kirchner*, 11 Moo. P. C. 21 ; *Kirchner v. Venus*, 5 Jur. (N.S.) 395, overruling *Gilkison v. Middleton*, 2 C. B. (N.S.) 134 ; *Neish v. Graham*, 8 El. & Bl. 505.

(*u*) *Lucas v. Nockels*, 4 Bing. 729 ; *Alsager v. St. Katherine's Dock Co.*, 14 Mee. & W. 794 ; *Foster v. Colby*, 3 H. & N. 705 ; see *Tamvaco v. Simpson*, 19 C. B. (N.S.) 453, affirmed L. R. 1 C. P. 363.

(*x*) *Tindall v. Taylor*, 4 El. & Bl. 219. In *Thompson v. Small*, 1 C. B. 328, payment was offered and delivery refused, and the refusal was held to amount to a conversion. See also *Thompson v. Trail*, 2 Car. & P. 334.

(*y*) *Peek v. Larsen*, L. R. 12 Eq. 378.

(*z*) *Small v. Moates*, 9 Bing. 574 ; *Gledstanes v. Allen*, 12 C. B. 202 ; *Kern v. Deslandes*, 10 C. B. (N.S.) 205 ; *West Hartlepool Steam Navigation, Ltd. v. Tagart Beaton & Co.*, 19 T. L. R. 251.

(*a*) *Fry v. Chartered Bank of India*, L. R. 1 C. P. 689.

Paragraphs
614—617

specified in the charter-party, the claim of the owner will, as against an endorsee for value of the bill of lading without notice of the charter-party, be limited to the amount mentioned in the bill of lading (*b*); and if the bill of lading state incorrectly that the freight has been paid, the shipowner is estopped from claiming it against an assignee for value without notice (*c*).

Agreement
between
consignees or
charterer's
agent and
third parties
with notice of
shipowner's
claim will
not affect his
lien

615. If the consignees abroad, with notice of the charter-party, or the charterer's agent, procure cargo on homeward freight consigned to persons who also have notice, and take bills payable in a manner inconsistent with a lien, this will not deprive the owner of his lien under the charter-party; and the lien will extend to the goods placed on board by different shippers, to the extent of the freight due on each of those consignments. And if the goods in such a case be purchased and shipped by the consignees abroad on account of the charterer (though consigned to creditors of those consignees) they will be subject to the owner's lien to the full extent of freight due under the charter-party (*d*). So, if the lading belongs to the charterer, and is subject to the shipowner's lien under the charter-party, the lading, if sold by the charterer after it is put on board, will pass to the purchaser subject to the lien (*e*). And the lien will not be affected by the unauthorized agreement of the master to carry goods for freight payable to other persons than the owner (*f*).

No lien for
charges
properly
payable by
owner but
which
freighter has
agreed to pay.

616. Port charges being properly payable by the owner of the ship, he has no lien upon the cargo for such part of them as the freighter has agreed but neglected to pay (*g*); nor for wharfage where by contract the goods are deliverable upon payment of the freight (*h*); nor for demurrage, either by law or by virtue of a covenant merely binding the ship and the cargo to be laden on board for the performance of the contract (*i*); although, as in the case of dead freight, a *quasi* lien for it may be raised by an express contract (*k*) (**610**).

Master of
ship has lien
for freight

617. The master has a possessory lien at common law, as the owner's agent, upon the goods carried, not only for the freight,

(*b*) *Mitchell v. Scaife*, 4 Camp. 298.

(*c*) *Howard v. Tucker*, 1 B. & Ad. 712.

(*d*) *Faith v. East India Co.*, 4 B. & Ald. 630; *Campion v. Colvin*, 3 Bing. N. C. 17.

(*e*) *Small v. Moates*, 9 Bing. 574.

(*f*) *Reynolds v. Jex*, 4 B. & S. 86.

(*g*) *Faith v. East India Co.*, 4 B. & Ald. 630.

(*h*) *Bishop v. Ware*, 3 Camp. 360.

(*i*) *Phillips v. Rodie*, 15 East, 547; *Birley v. Gladstone*, 3 Mau. & S. 205.

(*k*) See *Wegener v. Smith*, 15 C. B. 285; *Chappel v. Comfort*, 10 C. B. (n.s.) 802; *Francesco v. Massey*, L. R. 8 Ex. 101; *Lockhart v. Falk*, L. R. 10 Ex. 132. For instances of liens on cargo arising out of express contract, see *Dunlop v. Balfour*, [1892] 1 Q. B. 507; and *Clink v. Radford & Co.*, [1891] 1 Q. B. 625.

but also for general average (*l*). And although the Court of Admiralty does not take notice of general average for the purpose of giving effect to the lien at the instance of a person seeking to establish it, the court cannot annul, but is bound to act upon the right where acquired by a master in a case over which the court has jurisdiction (*m*).

Paragraphs
617—619
and general
average.

618. The following regulations have been made (*n*) concerning the liens of shipowners:—

Lien not
lost by
warehousing
the goods
with notice.

If the shipowner gives to the wharfinger or warehouseman notice in writing (*o*) that the goods landed from the ship and placed in his custody are subject to a lien for a specific amount for freight or other charges to the shipowner, the goods will remain so subject in his hands as before the landing thereof; and the wharfinger or warehouseman failing to retain them until the lien is discharged, is made responsible to the shipowner for any loss there by occasioned to him (*p*).

619. The lien will be discharged, by production to the wharfinger or warehouseman of a receipt for the amount claimed, and delivery to him of a copy thereof, or of a release of freight from the shipowner (*q*); or by deposit by the owner of the goods with the wharfinger or warehouseman of a sum of money equal to the amount claimed by the shipowner, in which case the lien shall be discharged without prejudice to any other remedy which the shipowner may have for the recovery of the freight (*r*). And if the person who makes the deposit does not, within fifteen days of making it, give to the wharfinger or warehouseman notice in writing to detain it, stating in the notice, the sum, if any, which he admits to be payable to the shipowner, or that he does not admit any sum to be payable, the wharfinger or warehouseman may, at the expiration of the fifteen days, pay over the sum so deposited to the shipowner, and shall by such payment be discharged from all liability in respect thereof (*s*).

Lien on
warehoused
goods lost
by production
to warehouse-
man of receipt
for debt, or
by deposit of
the amount
claimed.

But if the person making the deposit does, within fifteen days after making it, give to the wharfinger or warehouseman such notice in writing as aforesaid, the latter shall immediately apprise the shipowner of such notice, and shall pay or tender to him, out

(*l*) *Scaife v. Tobin*, 3 B. & Ad. 523, per Lord TENTERDEN, C.J., and PARKE, J.; *Cleary v. M'Andrew*, *Cargo ex Galam*, 2 Moo. P. C. (N.S.) 216.

(*m*) *Cleary v. M'Andrew*, *Cargo ex Galam*, *supra*.

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

(*o*) A master who wilfully inserts in such notice a sum in excess of that for which he has a lien, is guilty of a wrongful detention of goods and liable to an action for breach of duty. *Miedbrodt v. Fitzsimon*, L. R. 6 P. C. 306.

(*p*) Section 494. For similar provisions respecting goods landed at certain sufferance wharves in the Port of London, see the earlier private Act, 11 & 12 Vict. c. xviii. s. 4.

(*q*) 57 & 58 Vict. c. 60, s. 495.

(*r*) Section 495.

(*s*) Section 496.

Paragraphs
619—620

of the deposit, the sum, if any, admitted by the notice to be payable, and shall retain the balance, or if no sum is admitted to be payable, the whole of the deposit, for thirty days from the date of the notice. At the expiration of that period, unless legal proceedings have in the mean time been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any dispute between them concerning such freight or other charges as aforesaid, and notice in writing of such proceedings has been served on him, the wharfinger or warehouseman shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof (*t*).

If lien not
discharged,
warehouse-
man to sell
after certain
period.

620. If the lien be not discharged and no such deposit is made, the wharfinger or warehouseman may, and if required by the shipowner shall, at the expiration of ninety days from the time when the goods were placed in his custody, or if the goods were of a perishable nature at such earlier period as he in his discretion thinks fit, sell by public auction, either for home use or exportation, the said goods or so much thereof as may be necessary to satisfy the charges afterwards mentioned (*u*).

Before making such sale the wharfinger or warehouseman shall give notice thereof by advertisement in two newspapers circulating in the neighbourhood, or in one daily newspaper circulating in London, and in one local newspaper; and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharfinger or warehouseman or is otherwise known to him, give notice of the sale to the owner of the goods by letter sent by the post. But the title of a *bonâ fide* purchaser of such goods shall not be invalidated by reason of the omission to send such notice, nor shall any such purchaser be bound to inquire whether such notice has been sent (*x*).

In every case of any such sale, the wharfinger or warehouseman shall apply the moneys received from the sale as follows, and in the following order:—

- (1.) If the goods are sold for home use, in payment of any customs or excise duties owing in respect thereof.
- (2.) In payment of the expenses of the sale.
- (3.) In payment of the charges of the wharfinger or warehouseman and the shipowner, according to such priority as may be determined by the terms of the agreement (if any) in that behalf between them; or, if there is no such agreement:—

(*t*) Section 496.

(*u*) Section 497. *W. N. White & Co. v. Furness, Withy & Co.*, [1895] A. C. 40.

(*x*) Section 497.

- (a) In payment of the rent, rates, and other charges due to the wharfinger or warehouseman in respect of the said goods, and then
- (b) In payment of the amount claimed by the shipowner as due for freight or other charges in respect of the said goods ;

Paragraphs
620—623

and the surplus (if any), shall be paid to the owner of the goods (y).

621. When goods are placed in the custody of a wharfinger or warehouseman under the authority of the Act, the wharfinger or warehouseman shall be entitled to rent in respect of same, and shall also have power, at the expense of the owner of the goods, to do all such reasonable acts as, in the judgment of the wharfinger or warehouseman, are necessary for the proper custody and preservation of the goods, and shall have a lien on the goods for the rent and expenses (z).

Warehouse-
man entitled
to rent, etc.
and to have
lien for same

622. Nothing in the Act is to compel any wharfinger or warehouseman to take charge of any goods of which he would not otherwise be liable to take charge, or to bind him to see to the validity of any lien claimed by any shipowner under the Act (a) ; or to take away or abridge any powers given by any local Act to any harbour trust, body corporate or persons, whereby they are enabled to expedite the discharge of ships, or the landing or delivery of goods ; or to take away or diminish any rights or remedies given to any shipowner or wharfinger or warehouseman by any local Act (b).

Statutory
saving for
rights of
warehouse-
man, etc.

SUB-SECTION (3).—*The Lien for Labour upon Chattels.*

623. A person by whom a chattel has been improved has a possessory lien thereon for the price of his labour or of his skill, (though it be exercised without actual labour,) and for the expenses incurred in the improvement thereof (c).

Liens for
labour
performed
at request of
owner,

It is necessary for the validity of such a lien, that the work, in respect of which it is claimed,—

- (1.) Shall have been done at the request or by the rightful authority of the owner of the chattel (d) ; or at the request of some person with whom he has contracted to do the work ; (in other words, a sub-contractor has a lien (e) ;

(y) Section 498.

(z) Section 499.

(a) Section 500.

(b) Section 501.

(c) *Bevan v. Waters*, 3 Car. & P. 520 ; *Bleaden v. Hancock*, 4 Car. & P. 152, per TINDAL, C.J. ; *Judson v. Etheridge*, 1 Cr. & M. 743, per BOLLAND, J.

(d) *Hollis v. Claridge*, 4 Taunt. 807 ; *Hiscox v. Greenswood*, 4 Esp. 174 ; *Castellain v. Thompson*, 13 C. B. (N.S.) 105.

(e) *Bellamy v. Davey*, [1891] 3 Ch. 540.

Paragraphs
623—627

(2.) Shall have been completely performed (*f*). But if its completion was prevented by the owner of the chattel, a lien arises for the value of the work actually done (*g*).

Lien only relates to the chattel on which the labour is expended.

624. The lien is upon the chattel whereon the labour or skill has been bestowed, and not upon that by means whereof the improvement was wrought. Therefore the lien of the conveyancer is upon those documents upon which he has exercised his skill, not upon those which he has used in doing so. And the lien of the stereotype printer upon the printed work, not upon the stereotype plates. So, a person to whom a mortgage deed is delivered that he may receive the debt, has no lien upon it for his charge for making the application (*h*).

Lien attaches to each of several chattels even although they belong to different owners.

625. The lien extends to every part of several chattels for the price of the labour bestowed upon all. Hence the lien of the printer is upon all the printed work in his hands for the printing of the whole; and the lien of the tailor upon each part of a suit of clothes for the making of the whole (*i*).

If the goods which are subject to the lien belong to several owners, the whole may be detained, or the lien may be claimed *pro rata*; but part cannot be allowed to go free to one owner and the lien be claimed against the residue (*k*).

Lien of partners where one is part owner of chattel.

626. Partners in trade may have a lien for labour, although one of the firm be part owner of the chattel upon which the work was done (*l*).

Enumeration of specific liens in particular trades.

627. The possessory liens of the following persons for labour or expenditure upon the chattels are only specific, viz. :—

An *accountant* upon the books of account, for work done before the bankruptcy of the owner (*m*). An *arbitrator* upon the award, for his fees (*n*); an *auctioneer* upon the goods sold, for the price and for the charges of sale and commission (*o*). He also has a lien on purchase-money received by him, and may take his charges out of any part of it independently of the claims of subsequent assignees, and the doctrine of “marshalling” does not apply (*p*). A *cellarer*

(*f*) *Pinnock v. Harrison*, 3 Mee. & W. 532, per B. PARKE.

(*g*) *Lilley v. Barnsley*, 1 Car. & K. 344.

(*h*) *Bleaden v. Hancock*, 4 Car. & P. 152; *Steadman v. Hockley*, 15 Mee. & W. 553; *Sanderson v. Bell*, 2 Cr. & M. 304. In *Marks v. Lahee*, 3 Bing. N. C. 408, a lien was claimed on copper plates for money lent and labour in printing from them, but the latter claim was not discussed.

(*i*) *Blake v. Nicholson*, 3 Mau. & S. 167

(*k*) *Grant v. Humphery*, 3 Fost. & F. 162.

(*l*) *Franklin v. Hosier*, 4 B. & Ald. 341.

(*m*) *Exp. Southall*, 12 Jur. 576, per KNIGHT-BRUCE, V.-C.

(*n*) *R. v. South Devon Rail. Co.*, 15 Q. B. 1043; *Mason v. Stokes Bay Rail. Co.*, 32 L. J. Ch. 110; *Re Coombs*, 4 Ex. 839, per PARKE, B.

(*o*) *Williams v. Millington*, 1 H. B. 81; *Coppin v. Craig*, 7 Taunt. 243.

(*p*) *Webb v. Smith*, 30 Ch. D. 192.

upon the goods deposited, for the rent (*q*); a *coachmaker* (*r*); *commissioners* for taking acknowledgments, under the Fines and Recoveries Act, upon the deed acknowledged, the certificate of execution, and the affidavit of verification, for their fees (*s*); a *conveyancer* (*t*); a *dyer* (*u*); (though his right to a general lien was afterwards held to have been proved (*x*), and in another case was established upon proof of *local* usage in Gloucestershire (*y*)); a *farrier* (*z*); a *fuller* (*a*), who is said to be also entitled by the custom of Exeter to a general lien there (*b*); a *horse breaker* (*c*); a *horse trainer*, both for keep and training, unless by contract or custom the owner has rights of user inconsistent with the continued possession of the trainer (*d*); a *miller* (*e*); the owner of a *stallion*, for the price of covering a mare, upon the mare (*f*); a *parliamentary agent* (*g*); a *printer* (*h*); a *shipwright* for building or repairing the ship (*i*), and an *engineer*, for putting in the machinery (*k*); and a *tailor* (*l*).

Paragraphs
627—628

628. The *salvor* of property endangered by perils of the sea (*m*), Salvage of property endangered by sea, etc. or recaptured from an enemy (*n*), has also a lien on it for fair remuneration, and this lien extends to the shipowner who has paid, or bound himself to pay the salvage, in respect of the rateable part to which the cargo is liable (*o*). Being founded upon public

(*q*) *Gray v. Chamberlain*, 4 Car. & P. 260.

(*r*) *Houlditch v. Milne*, 3 Esp. 86, per Lord ELDON; *Howes v. Ball*, 7 B. & C. 481.

(*s*) *Exp. Grove*, 3 Bing. N. C. 304.

(*t*) *Hollis v. Claridge*, 4 Taunt. 807, per GIBBS, J.; *Steadman v. Hockley*, 15 Mee. & W. 553.

(*u*) *Green v. Farmer*, (*The Dyer*) 4 Bur. 2214; *Bennett v. Johnson*, 3 Dougl. 387.

(*x*) *Savill v. Barchard*, 4 Esp. 53.

(*y*) *Close v. Waterhouse*, 6 East, 523, n.

(*z*) *Read v. Burley*, Cr. Eliz. 596; *Rushforth v. Hadfield*, 7 East, 224, per Lord ELLENBOROUGH; *Scarfe v. Morgan*, 4 Mee. & W. at p. 284, per PARKE, B.

(*a*) *Rose v. Hart*, 8 Taunt. 499. But the claim to a general lien was negatived upon the construction of the term *mutual credit* in the Bankrupt Act, 5 Geo. 2, c. 30, and not upon the usage of the trade.

(*b*) *Sweet v. Pym*, 1 East, 4.

(*c*) *Judson v. Etheridge*, 1 Cr. & M. 743, per BOLLAND, B.; *Scarfe v. Morgan*, 4 Mee. & W. 270, per PARKE, B.

(*d*) *Bevan v. Waters*, 3 Car & P. 520; *Forth v. Simpson*, 13 Q. B. 681.

(*e*) *Exp. Ockenden*, Re *Mathews*, 1 Atk. 235.

(*f*) *Scarfe v. Morgan*, 4 Mee. & W. 270.

(*g*) *Ridgway v. Lees*, 25 L. J. Ch. 584.

(*h*) *Blake v. Nicholson*, 3 Mau. & S. 167.

(*i*) *Exp. Shank*, 1 Atk. 234; *Woods v. Russell*, 5 B. & Ald. 942; *The Vibilia*, 1 W. Rob. 1, per Dr. LUSHINGTON; *Exp. Bland*, 2 Rose, 91.

(*k*) *Exp. Willoughby*, Re *Westlake*, 16 Ch. D. 604.

(*l*) *Hostiler*, 5 Edw. 4 E. T., pl. 20, per HAYDON, J.; *Blake v. Nicholson*, 3 Mau. & S. 167.

(*m*) *The Nicolai Heinrich*, 17 Jur. 329; *Hingston v. Wendt*, 1 Q. B. D. 367.

(*n*) *The Two Friends*, 1 Rob. Ad. 272.

(*o*) *Briggs v. Merchant Traders Association*, 13 Q. B. 167.

Paragraphs
628—630

policy, in respect of the hazardous nature of the service, it does not extend to a reward for, or to the costs of placing in safety goods which have accidentally drifted from the bank of a navigable river (*p*). Nor to the salvage of goods detained by, and forcibly recovered from, a neutral power, before the property has been divested from the owners by condemnation (*q*). Nor does it entitle a person in possession of a strayed animal, to detain it for the cost of its keep (*r*).

A general
lien for
labour is
exceptional.

629. The right of retainer for general balances, founded upon the lien for labour, has been established in a very few instances. In some trades, the benefit of the lien is obtained, or attempted to be obtained, by fixing the employer with notice that the claimants will only transact business on the terms of a general lien; but the right to the general lien, independent of such notice and of evidence of usage, has been set up and has failed for want of sufficient evidence, in the cases of the *carrier*, the *fuller*, the *dyer*, and the *mill*er. And these, like other workmen the nature of whose business does not include the advance of money to their employers, have only by law a lien for the price of their labour upon the particular chattel of which it was the subject (*s*); and in the case of the carrier at least, the general lien, so far as it can be made out by evidence of usage, is by no means favoured in law.

Instances of
general liens
for labour.

630. The *packer*, (either on the ground of mutual credit, or because his business is in the nature of that of a factor (*t*)) (**666**), and the *calico printer* (*u*), have been held entitled to liens for general balances; but the lien of the latter is only for the balance due in

(*p*) *Nicholson v. Chapman*, 2 H. Bl. 254; nor will there be any claim for the salvage of it as wreck under the Merchant Shipping Act, 1894, s. 546: *Palmer v. Rouse*, 3 H. & N. 505.

(*q*) *Wilson v. Anderton*, 1 B. & Ad. 450.

(*r*) *Binstead v. Buck*, 2 W. Bl. 1117.

(*s*) *The Carrier: Rushforth v. Hadfield*, 6 East, 519; 7 East, 224; *Wright v. Snell*, 5 B. & Ald. 350; but the usage seems to have been established in *Aspinall v. Pickford*, 3 Bos. & P. 44, note. Unsuccessful attempts were made by carriers, where the custom was for the consignor to pay the carriage, to retain the goods for a general balance as against the consignee (*Butler v. Woolcott*, 2 Bos. & P. N. R. 64); and to retain for the balance of account between the consignee and the carrier, so as to affect the right of the consignor to stop in transitu. Lord ALVANLEY thought that even an agreement for such a right should not be allowed. (*Oppenheim v. Russell*, 3 Bos. & P. 42.) *The Fuller: Rose v. Hart*, 8 Taunt. 499. *The Bleacher*: established at Nottingham, and apparently, by the same evidence, exists at Loughborough. (*Plaice v. Alcock*, 4 Fost. & F. 1074.) *The Dyer: Green v. Farmer*, 4 Burr. 2214; *Bennett v. Johnson*, 3 Dougl. 387; *Close v. Waterhouse*, 6 East, 523, note; but see *Savill v. Barchard*, 4 Esp. 53. And per GIBBS, J., the custom had been proved by MANSFIELD, C.J., Lord ASHBURTON (Dunning) and himself, in the teeth of *Green v. Farmer*, in which there was no evidence of it, and it was decided that no such custom existed. (*Olive v. Smith*, 5 Taunt. at p. 60.) *The Miller: Exp. Ockenden, Re Mathews*, 1 Atk. 235.

(*t*) *Exp. Deeze*, 1 Atk. 228; per Lord MANSFIELD in *Green v. Farmer*, 4 Burr. at p. 2222; *Savill v. Barchard*, 4 Esp. 53, per Lord KENYON; *Re Witt, Exp. Shubbrook*, 2 Ch. D. 489.

(*u*) *Webb v. Fox*, Peake's Add. Ca. 167 (1797), *usage proved*; *Exp. Andrews*, Cooke's Bkt. Laws, 288, 423 (1764).

respect of work done in the particular business; not for money lent, or other collateral matters (x). Paragraphs
630—632

SUB-SECTION (4).—*The Lien of Solicitors upon Documents.*

631. The *solicitor* has a lien upon a document placed in his hands by a person entitled to dispose of it, for the price of work done thereon (y). He also has a similar lien for his general professional charges, upon all documents (z) or other property (a) of the client, which comes to his hands in the character of solicitor, while conducting the business, or for the purposes of the client, including letters of administration and other orders of court (b). General lien
on client's
documents.

632. This lien arises out of the relation between the client and the solicitor (c), and only when the solicitor receives the property in that character and in the performance of his professional duty to his client (d); and it is only available in respect of taxable costs; *ex. gr.*, it cannot be used as a security for advances made by the solicitor to the client (e). And the rule excludes from the operation of the lien, documents received by a solicitor as steward of a manor (f), land agent (g), next friend of an infant (h), trustee (i), or for safe custody (k); or as transferee of a mortgage paid off, or a mortgage for money lent by a solicitor out of his own money, and not with the money of his client (l). But where he discharges the debt with his client's money, given him for the purpose, and thereupon receives the deposited deeds, he receives them in the course of business, and in the performance of his duty to his client, and they become subject in his hands to his general lien (m). Strictly
limited to
professional
matters.

A solicitor is not, by the mere holding of an office under his

(x) *Welden v. Gould*, 3 Esp. 268 (1801), *per* Lord KENYON, lien admitted; see *Lilley v. Barnsley*, 1 Car. & K. 344.

(y) *Hollis v. Claridge*, 4 Taunt. 807.

(z) *Exp. Sterling*, 16 Ves. 258; *Exp. Nesbitt*, 2 Sch. & Lef. 279.

(a) *Friswell v. King*, 15 Sim. 191.

(b) *Re Martin*, 13 L. R. Ir. 312.

(c) *Pelly v. Wathen*, 1 De G. M. & G. 16.

(d) *Stevenson v. Blakelock*, 1 Mau. & S. 535. And see *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96, where the subject is discussed.

(e) *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590.

(f) *Champernown v. Scott*, 6 Mad. 93.

(g) *Re Walker, Meredith v. Walker*, 68 L. T. 517.

(h) Anon., cited Mont. Law of Lien, 53.

(i) *Brandao v. Barnett*, 12 Cl. & F. 787; *Re Gough, Lloyd v. Gough*, 70 L. T. 725; *Stumore v. Campbell*, [1892] 1 Q. B. 314.

(k) *Exp. Fuller, Re Long*, 16 Ch. D. 617; but see *Re Walker, Meredith v. Walker*, 68 L. T. 517.

(l) *Vaughan v. Vanderstegen, Annesley's Case*, 2 Drew. 409; *Pelly v. Wathen*, 7 Hare 351, affirmed 1 De G. M. & G. 16; *Gibson v. May*, 4 De G. M. & G. 512; *Sheffield v. Eden*, 10 Ch. D. 291.

(m) *Stevenson v. Blakelock*, *supra*.

Paragraphs
632—635

Lien of
London
agent
against
country
solicitor.

clients, deprived of his specific lien upon documents for the price of work done thereon as solicitor (*n*).

633. The lien of the London agent for a country solicitor is general, as against the latter (*o*). But it entitles the London agent to retain documents of the client received from the country solicitor in the progress of his client's business, so long only as a debt is due from the client to the country solicitor, or is unsatisfied by set-off or otherwise, and only to the extent of the debt due to him from the client in the particular business (*p*). The lien is limited to the sum so due, because the country solicitor cannot transfer a greater right than he possesses; and where his debts have been discharged by payment or satisfied by set-off or otherwise when the lien is claimed, the London agent cannot retain the deeds. The courts, however, will so far assist the agent as to give effect to his notice to the client not to settle behind his back with the country solicitor, of the benefit of whose lien the agent may thus obtain the full advantage.

The lien of the London agent is not affected by a change of the country solicitor (*q*).

Lien where
firm has been
changed.

634. The solicitor who claims a lien must be the same person to whom the costs, in respect of which it is claimed, are due. This rule excludes from the lien documents held by partners in respect of costs due to one or more of them before the partnership began, and documents held by a member of a dissolved partnership after the dissolution, for costs which were due to the firm (*r*).

No general
lien where
purposes of
deposit
special.

635. The solicitor cannot detain documents or other property which he has agreed to hold for a special purpose (*s*), beyond that purpose. A deposit for a special purpose, so as to be free from the general lien, must be by special agreement. If, in the general course of dealing, the client from time to time hands papers to his solicitor, and does not get them again when the occasion that required them is at an end, the conclusion is that they are left with him upon the general account (*t*).

(*n*) *R. v. Sankey*, 5 Ad. & El. 423; see *Newington Local Board v. Eldridge*, 12 Ch. D. 349.

(*o*) *Lawrence v. Fletcher*, 12 Ch. D. 858; *Re Jones and Roberts*, [1905] 2 Ch. 219.

(*p*) *Bray v. Hine*, 6 Price, 203; *Moody v. Spencer*, 2 D. & R. 6; *Waller v. Holmes*, 1 Johns. & H. 239; *Dicas v. Stockley*, 7 Car. & P. 587; *Re Andrew*, 7 H. & N. 87; *Exp. Edwards*, 8 Q. B. D. 262.

(*q*) *Ward v. Hepple*, 15 Ves. 297.

(*r*) *Re Forshaw*, 16 Sim. 121; *Vaughan v. Vanderstegen (Annesley's Case)*, 2 Drew. 409; but see *contra*, *Re Carter*, 53 L. T. 630, which is distinguishable because there the retiring member had removed the deeds without the consent of his late partners.

(*s*) *Lawson v. Dickenson*, 8 Mod. 306; *Young v. English*, 7 Beav. 10; *Gibson v. May*, 4 De G. M. & G. 512; *Re Clark, Exp. Newland*, 4 Ch. D. 515; *Stumore v. Campbell*, [1892] 1 Q. B. 314.

(*t*) *Exp. Sterling*, 16 Ves. 258, per LORD ELDON; *Colmer v. Ede*, 40 L. J. Ch. 185.

The general lien which the solicitor has upon documents delivered to him for the purpose of conducting a suit (*u*), is limited by the obligation to deliver them up, if they are required for the purposes of the suit (*x*); but he may retain such documents as he has received for general purposes, as well as for the purposes of the suit, if he had a lien thereon antecedent to the rights of the persons claiming in the suit (*y*). But where he has ceased to be solicitor *pendente lite*, he will be ordered to deposit the documents with an officer of the court for a certain period, in order that the client may have access to them (*z*).

Paragraphs
635—637

636. The lien is binding to the extent only of the client's interest in the deeds, or in the property to which they relate (*a*). This rule excludes from the right to a lien: the solicitor of a tenant for life, though employed by him in matters relating to the estate, as against the remainderman (*b*); the solicitor of one entitled to a portion of a charge as against the other owners of the charge (*c*); the solicitor of a partnership firm as against the private deed of one of the partners (*d*); the solicitor of a mortgagee, after the discharge of the mortgage (whether a reconveyance have been executed or not), in respect of costs due from the mortgagee (*e*); the solicitor of the official liquidator of a public company upon the proceedings and documents relating to the winding-up (*f*) (**592**).

Lien extends only to interest of client depositing the document.

637. Notwithstanding this rule, a solicitor in possession of deeds of a mortgaged estate, may hold them against a purchaser, subject to the mortgage, for costs due in respect of the mortgage, whether they be payable by the mortgagor or mortgagee (*g*). And the solicitor of a company has a lien on the company's deeds for costs incurred after the creation by the company of a floating charge on all its property, but before the appointment of a receiver to enforce the charge; and this, notwithstanding the fact that the debentures by which the floating charge was created, prohibited the company from mortgaging or charging its property (*h*).

Exceptions.

(*u*) *Balch v. Symes*, Turn. & Russ. 87, *per* Lord ELDON.

(*x*) *Baker v. Henderson*, 4 Sim. 27.

(*y*) *Warburton v. Edge*, 9 Sim. 508.

(*z*) *Exp. Scheyer*, 52 J. P. 183 (affirmed, see note [1888] W. N. 136) (C. A.).

(*a*) *Hollis v. Claridge*, 4 Taunt. 807; *Bell v. Taylor*, 8 Sim. 216.

(*b*) *Exp. Nesbitt*, 2 Sch. & Lef. 279; *Davies v. Vernon*, 6 Q. B. 443; *Lightfoot v. Keane*, 1 Mee. & W. 745.

(*c*) *Molesworth v. Robbins*, 2 Jo. & Lat. 358.

(*d*) *Turner v. Deane*, 3 Ex. 836.

(*e*) *Wakefield v. Newbon*, 6 Q. B. 276; *Plumtre v. O'Dell*, 1 Ir. Eq. R. 113; *Re Llewellyn*, [1891] 3 Ch. 145; *Pelly v. Wathen*, 1 De G. M. & G. 16.

(*f*) *Re Union Cement and Brick Co., Exp. Pulbrook*, L. R. 4 Ch. 627.

(*g*) *Ogle v. Story*, 4 B. & Ad. 735, discussed and distinguished, *Re Llewellyn*, *supra*.

(*h*) *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434.

Paragraphs
637—640

The solicitor of an executor has a lien upon the deeds of the testator for the executor's costs of the suit, unless the executor be indebted to the testator's estate (*i*).

Lien is subject to other parties' rights.

638. The lien of the solicitor, is subject to any equities to which the deeds were subject in the hands of the client when the solicitor received them, although he had no notice thereof (*k*), and subject to any future interests acquired by other persons as to costs incurred after the commencement (*l*). The interest of a subsequent judgment creditor is a future interest within this rule (*m*); and so, it would seem, is the interest of a trustee in bankruptcy of the client after the commission of an act of bankruptcy on which the client is adjudicated bankrupt (*n*). And the lien will not arise against the owner of prior equities, though the costs have been partly incurred for his benefit, unless he actually employed the solicitor (*o*).

Only exists where employment was proper, and only as against persons employing and those claiming under them.

639. The lien binds those persons only by, or on whose behalf, the solicitor was properly employed (*p*), and the persons who claim under them; and the solicitor does not lose his right in respect of costs incurred by the former, by the mere acceptance of a retainer from the latter (*q*).

This rule excludes the lien of the solicitor of a company in respect of business transacted for the directors in plain excess of their powers (*r*), though he may have his lien upon moneys in his hands which have been recovered in actions arising out of such business.

Mortgagee's solicitor has no lien against mortgagor.

640. The rule also excludes any lien in favour of the solicitor of a proposed mortgagee, upon deeds which have been delivered for examination to such proposed mortgagee, and by him to his solicitor; although the proposed mortgagor has promised to pay the costs of the investigation (*s*). For the solicitor was employed by the proposed lender, and the borrower's promise raised no privity between him and the solicitor. Even where the mortgage is completed (though in practice the solicitor is paid out of the money received by the borrower) there is no lien between him and the

(*i*) *Turner v. Letts*, 7 De G. M. & G. 243.

(*k*) *Marsh v. Bathoe*, Ridg. Ca. t. Hardwicke, 256; *Pelly v. Wathen*, 1 De G. M. and G. 16; *Smith v. Chichester*, 2 Dru. & War. 393; *Re Llewellyn*, [1891] 3 Ch. 145.

(*l*) *Blunden v. Desart*, 2 Dru. & War. 405.

(*m*) *Id.*

(*n*) See and consider *Re Pollitt, Exp. Minor*, [1893] 1 Q. B. 455.

(*o*) *Pelly v. Wathen*, *supra*.

(*p*) *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

(*q*) *General Share Trust Co. v. Chapman*, 1 C. P. D. 771.

(*r*) *Re Phoenix Life Assurance Co.*, 1 H. & M. 433.

(*s*) *Pratt v. Vizard*, 5 B. & Ad. 808.

solicitor, the business being done on the credit of the lender, against whom an action will lie for the costs (*t*).

Paragraphs
640—643

In the converse case where the mortgagor delivers the deeds to his own solicitor, that he may obtain a loan on transfer, the solicitor cannot hold them against the mortgagee, by whom he was not employed (*u*), unless the mortgage was a floating security and a receiver had not been appointed (*x*).

641. When the solicitor acts for both parties, he holds the deeds, after completion, for the mortgagee; and loses his lien upon them for costs incurred on behalf of the mortgagor, unless it was expressly reserved (*y*). So even where he would have a lien, or a right to a charge under the Solicitors Act, for the costs of a redemption action, he may, by his conduct in assenting to an hypothecation of any balance which may become payable to his client, estop himself from claiming his lien or charge (*z*). But he retains it as against the mortgagor and persons claiming under him (*a*). In the case of a deed the trusts of which provide for the costs of preparing it, he cannot obtain payment under such trusts irrespective of any lien (*b*).

As to
solicitor
acting for
both parties.

642. Where the custody of books or documents is confided to particular persons, these persons cannot, in breach of their duty, give a lien on those books or documents to their solicitor. Thus, directors of a company cannot give to the company's solicitor a lien, on books, which, under the articles of association or the Companies Acts, ought to be kept at the company's registered office (*c*).

No lien can
be created by
an act which
would be a
breach of
duty.

643. The solicitor of the mortgagee, on the other hand, cannot, after reconveyance (*d*), or even after discharge of the mortgage without reconveyance (*e*), hold the deeds as against the mortgagor as security for the mortgagee's costs; because the mortgagee cannot by handing the deeds to his solicitor, create a new lien against the mortgagor in respect of his own debt. But the mortgagee's solicitor may hold against a purchaser, subject to the mortgage,

As to
solicitor's
right after
satisfaction
of the
mortgagee.

(*t*) *Pratt v. Vizard*, *supra*; *Lawson v. Dickenson*, 8 Mod. 306.

(*u*) *Hutchinson v. Joyce*, 2 Jones, 122.

(*z*) See *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 454.

(*y*) *Re Snell*, 6 Ch. D. 105; *Re Mason and Taylor*, 10 Ch. D. 729; *Exp. Quin*, *Re Nicholson*, 49 L. T. 811. But the mere fact that a solicitor acts for mortgagor and second mortgagee in a redemption suit against the first mortgagee does not disentitle him to a charge on the property for the costs of both these parties. See *Macfarlane v. Lister*, 37 Ch. D. 88.

(*z*) *Macfarlane v. Lister*, 37 Ch. D. 88.

(*a*) *Re Messenger*, *Exp. Calvert*, 3 Ch. D. 317.

(*b*) *Worrall v. Harford*, 8 Ves. 4, and see also *Foster v. Elsley*, 19 Ch. D. 518, and *Strickland v. Symons*, 26 Ch. D. 245; *cf. Re Sadd*, 34 Beav. 650.

(*c*) *Re Anglo-Maltese Hydraulic Dock Co.*, 54 L. J. Ch. 730; *Re Capital Fire Insurance Association*, 24 Ch. D. 408.

(*d*) *Wakefield v. Newbon*, 6 Q. B. 276.

(*e*) *Plumtre v. O'Dell*, 1 Ir. Eq. Rep. 113.

Paragraphs
643—645

for costs due in respect of the mortgage, whether properly payable by the mortgagor or the mortgagee; for the purchaser should ascertain by whom the deeds are held before payment of his purchase-money (*f*).

Whether
husband's
solicitor has
lien against
trustees of
marriage
settlement.

644. Where the mortgagor obtained the deeds from the mortgagee and placed them in the solicitor's hands to enable him to sell in fraud of the mortgage, it was held (*g*) that the lien only covered the costs of the particular sale; as to extend it to general costs, would be to enable the solicitor to profit by the fraud of his client. Whether the trustees of a marriage settlement made by the client are persons claiming under the employer of a solicitor against whom he may claim his lien, is doubtful. In one case (*h*), it was held that they were; but in a more recent case (*i*) it was held by *Kekewich, J.*, that they were not, and the solicitor's lien was negatived. It is submitted that this decision is in accordance with the principle of modern authorities.

Solicitor's
right when
he discharges
himself.

645. The solicitor's right is not the same when he refuses any longer to conduct the client's business, as when the client discharges him. In the former case he is not suffered to keep the documents so as to hinder the transaction of the client's business, or the recovery of property, for which production of the papers is necessary. The solicitor, indeed, retains his lien in such a case, but under the condition that the client be put to no greater trouble, delay, or expense, than if the relation of solicitor and client remained undissolved. And this condition not being satisfied (*k*) by merely giving the client and his new solicitor free access to, with liberty to inspect and copy, the papers, the solicitor who claims the lien will be ordered to deliver to the new solicitor such of the documents as the latter, on inspection, shall deem necessary for the purposes of the suit, without prejudice to the lien, and with an undertaking to return them undefaced within a specified time after the hearing (*l*). To this, where there were conflicting opinions as to the propriety of prosecuting the suit, the court has added an undertaking on the part of the new solicitor to prosecute the cause with all due

(*f*) *Ogle v. Storey*, 4 B. & Ad. 735.

(*g*) *Young v. English*, 7 Beav. 10.

(*h*) *Re Gregson*, 26 Beav. 87.

(*i*) *Re Lawrance, Bowker v. Austin*, [1894] 1 Ch. 556.

(*k*) *Per Lord ELDON, Colegrave v. Manley*, Turn. & Russ. 400; *Rawlinson v. Moss*, 7 Jur. (N.S.) 1052; though Sir J. LEACH seems to have treated access and inspection as sufficient to satisfy the client's rights (*Moir v. Mudie*, 1 Sim. & St. 282). But note the difference as to delivery or taking copies between ordinary papers in a cause, and deeds which have an intrinsic value that cannot be given to copies. (*Griffiths v. Griffiths*, 2 Hare, 587.)

(*l*) *Colegrave v. Manley*, *supra*, and form of order there; *Lord v. Wormleighton*, Jac. 580; *Heslop v. Metcalfe*, 3 Myl. & Cr. 183; *Wilson v. Emmett*, 19 Beav. 233; see *Bozon v. Bolland*, 4 Myl. & Cr. 354; *Griffiths v. Griffiths*, 2 Hare, 587; *Huntley v. Anglo-Californian, etc. Co.*, 1 Fost. & F. 211.

diligence (*m*). Where the papers were not those of a particular client, but were retained against a country solicitor by his London agent, an undertaking was required to re-deliver them if the court should so order (*n*); but where the agent had refused either to proceed with the business or to hand over the papers, a summary order for delivery, without waiting until payment of his costs, was made against him (*o*).

Paragraph
645

The rights of the solicitor are affected by this rule where he refuses to proceed because the client does not supply him with funds to carry on the suit (*p*); or on the ground of dispute as to the manner and extent of his remuneration (*q*). And acts of misconduct on his part, in consequence of which the court considers that he ought no longer to remain in the relation of solicitor; or his imprisonment, by reason of which he can no longer carry on the business, are treated as equivalent to a discharge by the solicitor of himself (*r*). So is the dissolution of a partnership between solicitors; because, the client having stipulated for the services of both, is not obliged to trust to the care of one only; and in such a case it is immaterial (*s*) that only one of the partners has principally conducted the client's business. The bankruptcy of the firm of solicitors is also a discharge by themselves (*t*).

A new solicitor, who is employed in a suit or in any conveying or other matter, may demand the papers for the purpose of conducting it; but when the suit or matter is at an end, the lien of the former solicitors revives, and the papers cannot be touched for any new purpose, without payment of what is due to them. Before delivering the papers for the limited purpose, the former solicitors are also entitled to an affidavit that the papers are wanted for the completion of the business in which the firm was employed at the time of the dissolution, and in respect of which the papers came into their possession (*u*).

Where a solicitor dies, the full benefit of the lien is given to his representatives, because the proceedings are not delayed by any default of the solicitor. It seems, however, that the court has jurisdiction over the representatives (*x*).

(*m*) *Cane v. Martin*, 2 Beav. 584.

(*n*) *Re Smith*, 4 Beav. 309.

(*o*) *Re Walton*, 4 K. & J. 78.

(*p*) *Heslop v. Metcalfe*, 3 Myl. & Cr. 183; *Robins v. Goldingham*, L. R. 13 Eq. 440.

(*q*) *Wilson v. Emmett*, 19 Beav. 233.

(*r*) *Re Smith*, 4 Beav. 309; *Re Williams*, 6 Jur. (N.S.) 908; but see *Re Smith*, 9 W. R. 396.

(*s*) *Griffiths v. Griffiths*, 2 Hare, 587; and see *Cholmondeley v. Clinton*, 19 Ves. at p. 273; *Rawlinson v. Moss*, 7 Jur. (N.S.) 1052.

(*t*) *Per Lord ROMILLY*, M.R., *Re Moss*, L. R. 2 Eq. 345.

(*u*) *Rawlinson v. Moss*, 7 Jur. (N.S.) 1052.

(*x*) *Redfearn v. Sowerby*, 1 Swans. 84.

Paragraph
646

When he is
discharged.

646. On the other hand, when the client discharges the solicitor (*y*), the latter will not be compelled to afford any facilities to the client by giving access to the papers, which the solicitor may retain until payment of his general costs. The court has, however, jurisdiction (upon the client paying into court or giving security for, a sum sufficient to answer the solicitor's demand) to order, delivery up by the solicitor of the client's papers, before taxation of his costs, if their retention by him would embarrass the client in the prosecution or defence of a pending action (*z*). This jurisdiction only relates to liens of solicitors as such. On the bankruptcy of his client the solicitor is in the same position as if discharged otherwise than by his own act or fault: the right of the assignees not being greater than that of the bankrupt, no order to produce or give a copy on payment of the costs relating to the required document only, will then be made (*a*). The circumstance that one of the members of the client's firm which has become bankrupt, is also one of the firm of solicitors, does not, where the latter firm remains solvent, alter the ordinary rule which arises on the bankruptcy of the client (*b*). The same rule entitles the solicitor of a company to resist an order for production of documents in his hands on the winding-up of the company, notwithstanding the provisions of the Winding-up Act authorizing an order against every person to produce the documents in his possession (*c*).

(*y*) *Lord v. Wormleighton*, Jac. 580; *Bozon v. Bolland*, 4 Myl. & Cr. 354, per Lord COTTENHAM; *Re Faithful*, L. R. 6 Eq. 325, explaining *Re Bevan and Whitting*, 33 Beav. 439; *Exp. Yalden, Re Austin*, 4 Ch. D. 129. In *Simmonds v. Great Eastern Rail. Co.*, L. R. 3 Ch. 797, the L.J.J. held, but partly on the circumstances of the case, that where the solicitor of the plaintiff had been discharged by his assignee in bankruptcy he must produce the documents necessary for drawing up the decree (which had been made without opposition), notwithstanding his lien for costs. It was intimated that the case was almost within the principle that the solicitor's lien cannot intercept the completion of an order of the court; but the court adopted a distinction suggested by counsel, between the dismissal of the solicitor by the executor of the client (as in *Lord v. Wormleighton*, *supra*), and the dismissal by his assignee in bankruptcy (as in *Ross v. Laughton*, 1 Ves. & B. 349), which latter case they considered had not been, as was commonly supposed, overruled by the former case. But their lordships must have overlooked the fact that Lord ELDON himself said, in deciding *Lord v. Wormleighton*, that he was stating an opinion contrary to what he thought when the cases cited (of which *Ross v. Laughton* was one) were before him, and that Lord COTTENHAM (*Bozon v. Bolland*, 4 Myl. & Cr. at p. 358) also said the decisions were contrary; nor is there anything in Lord ELDON's judgments to support the distinction, which also appears to conflict with the cases cited below. It is also submitted that the solicitor's right depends upon his own merits arising from his former exertions and outlay, and his subsequent dismissal without misconduct, and not upon the accident whether his late client's interest has vested in his executor or his assignee in bankruptcy. In *Newington Local Board v. Eldridge* (12 Ch. D. 349) a mandamus was granted against the clerk of the board to deliver papers, upon payment into court of the estimated amount of the taxed costs, which was to be subject to the lien, if any—that question being left open until the trial.

(*z*) *Re Galland*, 31 Ch. D. 296, in which LINDLEY, L.J., queried whether the court's jurisdiction was not extended by Order L. r. 8 of the R. S. C.

(*a*) *Exp. Underwood*, De G. 190.

(*b*) *Re Moss*, L. R. 2 Eq. 345.

(*c*) *Re Oxford, etc., Rail Co.*, 1 De G. & Sm. 728.

If, however, the solicitor voluntarily produce the papers as evidence in a cause, he cannot, on that ground, claim a lien upon the fund recovered in the cause, though the production was essential to the obtaining of the decree; for he cannot thus by his own act create a lien upon the fund, which would be as extensive as that upon the deeds—viz., for general professional charges; the ordinary lien upon a fund being only for the costs of the suit in which it was recovered. The lien is not changed or transferred by the production of the deed, though its value may be gone (*d*).

Paragraphs
646—648

647. The solicitor's right is limited by the lien; and if a new solicitor be appointed during the progress of a suit, the former one has no right to require the proceedings to be suspended until payment of his bill (*e*). And if the solicitor, though discharged by the client, have not delivered his bill of costs within the month required by the order for taxation, he will be compelled to hand over the papers without prejudice to his lien; especially if the papers required are not all which he holds, and if he have a balance in hand towards payment of his demand. For by disregarding the obligation to deliver his bill he has disentitled himself to the full benefit of his lien (*f*).

Old solicitor cannot suspend the suit, if he fails to deliver his bill.

An offer by a solicitor to proceed with the cause, after he has discharged himself by assigning his business, will not prevent the order for delivery (*g*).

648. The lien of the solicitor is only a right between his client and himself (*h*); and if the client be bound to produce a deed for the benefit of a third person, so also must the solicitor notwithstanding his lien. But although production will be ordered of a deed for the purposes of evidence on subpœna, on behalf of a person whose interests are affected by it, and who is not liable to pay the debt in respect of which the lien is claimed, such an order for production will not extend to delivery, or be made so as otherwise to prejudice the lien (*i*). And where the solicitor's lien is collateral to the cause he will not be compelled to produce by an order in the cause, but must be served with a subpœna *duces tecum* (*k*). The person who is liable to the debt, claiming the deed for his own purposes, may

He may have to produce the documents without prejudice to his lien.

(*d*) *Perkins v. Bradley*, 1 Hare, 219; *Bozon v. Bolland*, 4 Myl. & Cr. 354; *Hall v. Laver*, 1 Hare, 571. It seems to be otherwise where production is ordered.

(*e*) *Merrewether v. Mellish*, 13 Ves. 161; *Twort v. Dayrell*, 13 Ves. 195; *O'Dea v. O'Dea*, 1 Sch. & Lef. 315.

(*f*) *Cooper v. Hewson*, 2 Y. & Coll. C. C. 515.

(*g*) *Colegrave v. Manley*, Turn. & Russ. 400.

(*h*) *Furlong v. Howard*, 2 Sch. & Lef. 115; *Ley v. Barlow*, 1 Ex. 800; *Lockett v. Cary*, 10 Jur. (N.S.) 144.

(*i*) *Brassington v. Brassington*, 1 Sim. & St. 455; *Hope v. Liddell*, 20 Beav. 438, affirmed 7 De G. M. & G. 331; *Re Cameron's Coalbrooke Rail. Co.*, 25 Beav. 1; see *Vale v. Oppert*, L. R. 10 Ch. 340.

(*k*) *Busk v. Lewis*, 6 Mad. 29; see *Fowler v. Fowler*, 50 L. J. Ch. 686.

Paragraphs be denied access to it until payment of the claim (*l*). Nor will any
648—652 lien be a protection against the liability to produce a deed which it is the object of the suit to impeach (*m*) (**692**).

The document will be rendered safe. **649.** Again, if the property of the client be in danger of loss by the detention of papers, it seems the court will order delivery, that the property may be secured and brought into court (*n*).

Lien may not impede the proceedings. **650.** The lien may not be exercised so as to embarrass the conduct of a suit, or to interfere with the management of an estate which is being administered by the court (*o*); or to intercept the completion of an order of the court, which will be ordered to be produced to the proper officer for completion, and to be returned when complete to the claimant, who is allowed costs for his attendance. And he will be declared entitled to a lien on any fund in court, or to be paid in the cause, for the amount of his bill of costs (*p*); unless the debt is statute barred and the client claims the benefit of the statute (*q*).

No lien where infant plaintiff repudiates when adult. **651.** If an order be made in the suit of an infant plaintiff by his next friend, for the deposit of the deeds in court for the purpose of discovery, and the plaintiff having attained his majority repudiate the suit before the hearing, the deeds will be ordered to be re-delivered to the defendant by whom they were deposited, without regard to any claim by the plaintiff's solicitor for a lien for his costs, even assuming that a lien could be acquired under such circumstances: because the repudiation relates back to the commencement of the suit, and prevents the right of the holder of the deeds to dispose of them from being affected by it (*r*).

Different rights where deeds are deposited for purposes of suit only and where held for other purposes. **652.** Where deeds deposited in the solicitor's hands, only for the purposes of the suit, are directed to be given up by the decree, the solicitor being unable to acquire any lien on them after the commencement of the suit, and having no prior lien, will be ordered to deliver them unconditionally (*s*). It will, however, be otherwise if they did not come into possession for the purposes of the cause only, but for those and other purposes; and if the lien

(*l*) See *Brassington v. Brassington*, *supra*, *Hope v. Liddell*, *supra*, and *Re Cameron's Coalbrooke Rail. Co.*, *supra*.

(*m*) *Balch v. Symes*, Turn. & Russ. 87.

(*n*) *Richards v. Platel*, Cr. & Ph. 79.

(*o*) *Belaney v. Ffrench*, L. R. 8 Ch. 918; *Re Boughton*, 23 Ch. D. 169; *Gerty v. Mann*, 29 L. R. Ir. 7; *Hutchinson v. Norwood*, 54 L. T. 842; but *cf. Re Capital Fire Insurance Association*, 24 Ch. D. 408; *Boden v. Hensby* (1892), 1 Ch. 101.

(*p*) *Clifford v. Turrill*, 2 De G. & Sm. 1; and see *Benyon v. Amphlett*, 8 Jur. (N.S.) 759.

(*q*) *Re Carter*, 53 L. T. 630.

(*r*) *Dunn v. Dunn*, 1 Jur. (N.S.) 122.

(*s*) *Baker v. Henderson*, 4 Sim. 27; *Bell v. Taylor*, 8 Sim. 216; and see *Smith v. Chichester*, 2 Dru. & War. 393.

claimed be for other matters besides the cost of the suit, and for costs incurred prior to the right of the person who seeks the delivery of the deeds (*t*). Paragraphs
652—656

653. Where a person is ordered to produce documents in the hands of his solicitor, who claims a lien upon them, the client must discharge the lien, and produce the deeds (*u*). And if there be a difficulty in getting possession of them, (as if the person on whom the order is made be bankrupt and unable to discharge the claim), the order will still be made, with liberty to apply to the court for relief if it cannot be obeyed (*x*); or the court will from time to time enlarge the period for production, so as to enable the party to recover the possession of the deeds (*y*). As to party
ordered to
produce
where
solicitor
claims lien.

654. It has been said (*z*) that this course will be followed where deeds belonging to a trust have come to the solicitor's hands, and he claims to hold them subject to a lien. But if a solicitor receive documents, with notice that they belong to a trust, he incurs an immediate liability to those for whom his client was trustee, and is subject to the same remedies as the trustees himself for recovering possession of the deeds (*a*). Where deeds
belong to a
trust.

In such a case it seems that the court has jurisdiction upon petition to order delivery of the deeds; but in some cases (as probably where the deeds are not in the solicitor's hands by reason of his employment as trustee but in some other way, and it would seem without notice of the trust) it may be necessary to make the solicitor a party to the suit (*b*).

655. Where the committees of a lunatic, who were ordered to raise money on mortgage, were prevented from completing the security by the claim of solicitors to retain the deeds under a lien, it was ordered that the proposed mortgagees should be at liberty to pay the committees sufficient to enable them to discharge the lien, without prejudice to the lunatic's right to have the bill of costs taxed and the accounts investigated (*c*). Where to a
lunatic.

656. The courts of law generally refuse to exercise their summary jurisdiction over solicitors by compelling them to deliver up documents, where, there being no cause in court, nor any criminal conduct imputed to the solicitor, the matter had been the proper subject of a bill in equity or of an action at law. And the rule was Courts
reluctant to
exercise
summary
jurisdiction
in cases of
lien.

(*t*) *Warburton v. Edge*, 9 Sim. 508.

(*u*) *Exp. Shaw*, Jac. 270; see *Liddell v. Norton*, Kay, xi.

(*x*) *Rodick v. Gandell*, 10 Beav. 270.

(*y*) *Goodchap v. Weaving*, 16 Jur. 586, as in the case of an executor whose books are in a distant country. *Freeman v. Fairlie*, 3 Mer. 44.

(*z*) *Goodchap v. Weaving*, *supra*.

(*a*) *Francis v. Francis*, 2 De G. M. & G. 73.

(*b*) *Goodchap v. Weaving*, *supra*, and see *Rider v. Jones*, 2 Y. & Coll. C. C. 329.

(*c*) *Re Davies* (a lunatic), 12 L. J. Ch. 456.

Paragraphs
656—657

laid down, that where a solicitor was employed in a manner wholly unconnected with his professional character, the court would not interfere in a summary way to compel him to execute the trust reposed in him. But where the employment was so connected with his professional character as to afford a presumption that it formed the ground of his employment by the client, there the court would exercise its jurisdiction (*d*). An application against a solicitor holding the documents as a steward has on this ground been refused (*e*). But the order was made where it was clear there could be no lien (*f*). It was, however, laid down in a recent case, that the court will not exercise its summary jurisdiction unless it be clearly shown not only that the solicitor has no lien, but also that he holds the documents in question for the applicant alone *and as his solicitor* (*g*).

The jurisdiction was also exercised by courts of equity where the documents were received by the solicitor in the way of his business (*h*).

Where a deed was in the hands of a solicitor as a party and trustee, a court of law, even on his submission to do so, would not order him to deliver it (*i*).

Where the solicitor's claim to a lien on the deed of a bankrupt is disputed, the remedy of the trustee for the recovery of the deed is by action of trover (*k*).

A solicitor, on discharge of his bill, is bound to deliver up all drafts and copies for which his client has paid, as well as original documents (*l*).

It has power, where taxation permitted, to order delivery of bill and of documents.

657. The courts and judges have power, where they are authorized to refer the bill of a solicitor for taxation, to make an order for the delivery by him, his executor, administrator or assignee, of the bill, and for the delivery of deeds, documents or papers in his possession, custody or power, or otherwise touching the same, as was done by such courts or judges where any such

(*d*) *Per* ABBOTT, C.J., *Re Aitkin*, 4 B. & Ald. 47; see *Cocks v. Harman*, 6 East, 404. Professedly followed in *Re Lowe*, 8 East, 237, though the employment seems to have been that of an attorney. (See *Re Millard*, 1 Dowl. P. C. 140.) And in *Hughes v. Mayre*, 3 T. R. 275, the attorney, as steward of a manor and receiver, was ordered to deliver.

(*e*) *Cocks v. Harman*, *supra*.

(*f*) *Re Sharpe*, 1 Dowl. P. C. 432.

(*g*) *Exp. Cobeldick*, 12 Q. B. D. 149.

(*h*) *Exp. Earl of Uxbridge*, 6 Ves. 425; *Re Murray*, 1 Russ. 519. So in the exercise of the general jurisdiction over solicitors. (*Re Blanchard*, 3 De G. F. & J 131). In an Irish case, where a lien was disputed, the solicitor was ordered at the hearing to bring the deeds into court without prejudice to his lien, and an inquiry was directed as to its existence and extent. (*Walcott v. Graves*, 11 Ir. Eq. Rep. 396.)

(*i*) *Pearson v. Sutton*, 5 Taunt. 364.

(*k*) *Exp. Llewellyn*, *Re Wright*, 8 Jur. 816.

(*l*) *Exp. Horsfall*, 7 B. & C. 528.

business had been transacted in the court in which such order was made (*m*). Paragraphs
657—661

658. After an order has been made for winding up a company under the Companies Acts (consolidated by the Companies Consolidation Act, 1908), the court may require any officer of the company, or person whom it is empowered to summon for the purpose of giving information as to the affairs of the company, to produce any books, papers, deeds, writings, or other documents in his custody or power, relating to the company, without prejudice to any lien claimed by such person thereon, and has power to determine all questions relating to such lien (*n*). The solicitors of the company are liable under this provision to produce documents relating to the company on the summons of the liquidator (*o*), but a valid lien existing at the date of a winding-up order will not be defeated (*p*). Statutory
provision as
to companies
ordered to be
wound up.

659. It would seem that if a solicitor takes security for his costs, that is *primâ facie*, (and in the absence of evidence of a contrary intention), an abandonment of his lien (*q*). But the fact of his taking a security on the documents in respect of which he claims a lien, by way of securing an advance, does not prejudice his lien (*r*). Nor is the lien lost by suing the client for the costs (*s*). Solicitor
taking
security
primâ facie
abandons
lien

SUB-SECTION (5).—*The Liens of Factors, Brokers, Bankers, and other Agents.*

660. An agent has a *specific* possessory lien upon the property of the principal in his hands, co-extensive only with his actual or constructive possession (*t*). A right of *general* lien does not arise out of the mere relation of principal and agent, but only in respect of dealings in particular trades in which a general lien has been judicially proved and acknowledged, or in which the custom has been established (*u*) (596—600). Agents have
particular
but not
general lien.

661. An agent or trustee who carries on business in his own name, with the stock and for the benefit of his employer or beneficiary, has a specific lien upon the property in his possession, as an *agent*; and Lien of
trustee who
carries on
trade; and

(*m*) Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 37.

(*n*) 8 Edw. 7 c. 69, s. 174.

(*o*) *Exp. Paine & Layton*, L. R. 4 Ch. 215; but see *Re Capital Fire Insurance Association*, 24 Ch. D. 408.

(*p*) *Re Rapid Road Transit Co., Ltd.*, [1909] 1 Ch. 96.

(*q*) *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590; and cf. *Groom v. Cheese-wright*, [1895] 1 Ch. 730; and *Bissill v. Bradford Tramways Co.*, W. N. [1893] p. 44. But see and distinguish *Re Morris*, [1908] 1 K. B. 473.

(*r*) *Re Harvey's Estate* 17 L. R. Ir. 65.

(*s*) *Re Aikin's Estate*, [1894] 1 Ir. Reps. 225.

(*t*) *Exp. Banner, Re Tappenbeck*, 2 Ch. D. 278.

(*u*) *Bock v. Gorrisen*, 2 De G. F. & J. 434; per Lord CAMPBELL.

Paragraphs
661—665

rights of
creditors by
subrogation.

indemnity against liabilities incurred in respect of the business (*x*) ; and such lien passes to his trustee in bankruptcy (*y*) ; but the business must have been carried on in accordance with the agent's authority, and the lien only covers the sum necessary for carrying it on. The creditors of the business are also entitled to stand in the place of the agent, and to have the benefit of his lien to the extent to which he can establish it (*z*).

Lien of agent
on proceeds
of contract.

662. An agent who enters into a contract with the authority of his principal, or without it if the principal adopt the contract, is entitled to a lien for the expenses incurred in the performance of the contract, upon the proceeds thereof coming to his hands (*a*). But a mere agent, to whom property belonging to his principal has been delivered for his use, has not a lien thereon in respect of a liability voluntarily incurred by the agent without the direction or knowledge of the principal (*b*).

Lien of ship's
husband and
master.

663. A ship's husband, who is agent for the owners, has a lien, which is strictly possessory, upon the freight and cargo for his disbursements (*c*). But the master of a ship has no possessory lien upon the ship or freight for the cost of repairs, supplies, or other expenditure or debts incurred on account of the ship in England or on the voyage, or for premiums paid by the master abroad for procuring the cargo (*d*).

Lien of
agents for
disburse-
ments.

664. And generally, an agent who has advanced money or incurred liability on account of his principal, is protected by a lien on the property in respect of which the advances were made, or the produce of the sale of it. Therefore an army agent has a lien upon an officer's money in the agent's hands, for advances to the officer for his outfit, although the advances were misapplied and the officer was under age (*e*).

Lien of
consignee for
advances.

665. A consignee who has made advances to his consignor to pay for goods, on an agreement for hypothecation of the bills of lading, is clearly entitled to hold them as against the consignor and persons claiming under him (*f*). But an agreement that the lender shall be employed to sell, and shall be repaid out of the proceeds

(*x*) *Foxcraft v. Wood*, 4 Russ. 487 ; *Re Pavy's Patent Felted Fabric Co.*, 1 Ch. D. 631.

(*y*) *Jennings v. Mather*, [1902] 1 K. B. 1.

(*z*) *Exp. Garland*, 10 Ves. 110 ; *Exp. Edmonds, Re Beater*, (*per* TURNER, L.J.), 4 De G. F. & J. at p. 498 ; *Re Johnson, Shearman v. Robinson*, 15 Ch. D. 548.

(*a*) *Bristow v. Whitmore*, 9 H. L. C. 391, *per* Lord CAMPBELL.

(*b*) *Gurney v. Sharp*, 4 Taunt. 242.

(*c*) *Harris v. Reynolds*, 4 W. R. 278 ; *Beynon v. Godden*, 3 Ex. D. 263.

(*d*) *Wilkins v. Carmichael*, 1 Dougl. 101 ; *Hussey v. Christie*, 9 East. 426 (notwithstanding opinion of Lord ELDON, L.C., *Hussey v. Christie*, 13 Ves. 594) ; *Smith v. Plummer*, 1 B. & Ald. 575 ; *Lister v. Payn*, 11 Sim. 348.

(*e*) *Lavrie v. Bankes*, 4 Jur. (N.S.) 299.

(*f*) *Lutscher v. Comptoir D'Escompte de Paris*, 1 Q. B. D. 709.

of goods expected to be purchased, will not give a lien upon goods afterwards purchased and sent, but which were not paid for out of the advances (*g*). Paragraphs
665—666

666. A factor has a specific lien upon goods bought, for the purchase-money (*h*) and for customs dues, or salvage (*i*) and freight (*k*) paid in respect thereof. Lien of
factor for
price of
goods bought
by him
under
salvage,
customs and
freight.

A factor, to whom goods are consigned with authority to sell, has a lien on the goods during his possession of them, and, when they are sold, upon the purchase-money, as a security for the general balance due to him from his principal; including such advances as he may have made, and such liabilities as he may have incurred on the principal's account in the course of the business (*l*), and commission (*m*). If he become possessed of the goods before the principal's bankruptcy, and is selling them at that time, he may retain the purchase-money in payment of his general lien, though it be not received till after the bankruptcy (*n*); and if the purchaser be indebted to the factor, a settlement of accounts between the purchaser and the factor, or his assignees, will bind the principal (*o*).

Where factors at the request of the principal, and after his bankruptcy at the request of his assignees, delayed the sale of goods in their hands upon which they had a lien, they were allowed to retain, out of the proceeds of the sale, interest on the debt accruing after the bankruptcy, notwithstanding the rule in bankruptcy that interest stops at the date of the bankruptcy (*p*). Payment by a factor of part of the freight of goods, does not constitute such a constructive possession as will support a lien (*q*). A factor (*r*) or broker (*s*) who sells on behalf of another factor or broker, knowing his character, but without authority from the principal to act in his place, has no lien as against the principal, upon the proceeds of the goods, for the payment of freight or other dues, or in discharge of his own acceptances on account of the goods.

(*g*) *Deane v. Byrnes*, 3 Moo. P. C. (N.S.) 92.

(*h*) *Exp. Emery*, 2 Ves. Sen. 674.

(*i*) *Paul v. Birch*, 2 Atk. 621, *per* Lord HARDWICKE.

(*k*) *Exp. Good*, 3 Mont. & A. 246.

(*l*) *Per* Lord MANSFIELD, in *Godin v. London Assurance Co.*, 1 Bur. 490; *Baring v. Corrie*, 2 B. & Ald. 137; *Kinloch v. Craig*, 3 T. R. 119, 783; *Hammonds v. Barclay*, 2 East, 226; *Re Fawcus, Exp. Buck*, 3 Ch. D. 795. In the previous edition this proposition was restricted to goods consigned with authority to the agent to sell in his own name; but this limitation was disregarded in *Stevens v. Biller*, 25 Ch. D. 31.

(*m*) *Re Hermann Loog, Limited*, W. N. (1887), pp. 180, 191.

(*n*) *Robson v. Kemp*, 4 Esp. 233.

(*o*) *Hudson v. Granger*, 5 B. & Ald. 27.

(*p*) *Exp. Kensington, Re Lancaster*, 1 Deac. 58.

(*q*) *Kinloch v. Craig*, *supra*.

(*r*) *Solly v. Rathbone*, 2 Mau. & S. 298.

(*s*) *Cockran v. Irlam*, 2 Mau. & S. 301.

Paragraphs
666—668

The regulations made by the Factors Act concerning pledges and liens, have been already noticed (386—397).

Lien of
wharfinger
for general
balance.

667 A wharfinger has a lien, resembling that of a factor, upon the goods in his possession for the general balance due to him for freight and wharfage (*t*); but claims for warehouse room and labourage depend upon evidence of undisputed usage; and if the right be disputed where the wharfinger's business is carried on, he can only claim under special agreement, or after previous notice to the customer of the terms upon which the business is conducted (*u*). And in the character of a shipping agent or warehouse keeper, a wharfinger has no general lien unless by contract (*x*). A wharf or warehouse owner has a lien for his rent upon goods placed in his custody under the Merchant Shipping Amendment Act, 1862; and for the expenses of such reasonable acts, as in his judgment are necessary for their custody and preservation (*y*) (619). By custom, in the City of Bristol a warehouse keeper has a general lien on goods warehoused, for rent, labourage, and other charges in connection with those or any other goods of the same person, whether warehoused before or after them (*z*).

Liens of
brokers.

668. A broker, who merely sells on account of his principals, has not, like a factor, the possession which is necessary to give him a lien. If he sell, and the goods are delivered to him for the use of his employers, his possession is theirs; and if he have paid money on their account without direction from or notice to them, he cannot claim a lien for the outlay (*a*). But if a broker advance money and give acceptances on the credit of goods lodged in his hands by consignees, the owner cannot claim them without both paying his advances and indemnifying him against the outstanding bills, in respect of which the mere counter acceptances of the owner will not be sufficient indemnity (*b*). And if he accept bills for merchants already indebted to him on a running account, on the merchants undertaking to assign him a cargo of which they are consignees, he has a lien on the cargo for the general balance due to him from the merchants (*c*).

(*t*) *Naylor v. Mangles*, 1 Esp. 109; *Savill v. Barchard*, 4 Esp. 53, *per* Lord KENYON; *R. v. Humphery*, M'Clel. & Y. 173, 188; *Spears v. Hartley*, 3 Esp. 81.

(*u*) *Holderness v. Collinson*, 1 Man. & Ry. 55. See *Dresser v. Bosanquet*, 4 B. & S. 460, 468.

(*x*) *Bowman v. Malcolm*, 11 Mee. & W. 833, *per* PARKE, B.

(*y*) 57 & 58 Vict. c. 60, s. 499.

(*z*) *Re Catford*, 71 L. T. 584.

(*a*) See *Baring v. Corrie*, 2 B. & Ald. 137; *Gurney v. Sharp*, 4 Taunt. 242.

(*b*) *Pultney v. Keymer*, 3 Esp. 182.

(*c*) *Exp. Barber, Re Evans*, 3 Mont. D. & De G. 174.

669. An insurance broker has a lien upon a policy effected by him in that character for the premiums paid thereon, and also for his general balance, both by the custom of London (*d*) and by general usage (*e*). Paragraphs
669—670
Lien of
insurance
broker.

A broker who effects a policy by the direction of an agent (*f*), without notice that he is not the principal, has a lien as against the real principal; and may apply in satisfaction of that balance money received on the policy as well before as after notice of the right of the principal: because the broker gave credit to his immediate employer as the real owner of the goods. And the burthen of showing that the broker had notice of the agency lies on the real principal (*g*). For the same reason, a broker who buys goods under the direction of an agent, without notice of the agency, has a lien upon them as against the real principal for the purchase-money (*h*). And a purchaser who buys from a factor, without notice that he is so, has a lien for his general balance due from the agent (*i*).

When a broker effects a policy by the direction of an agent with notice of the agency, he has no lien upon the proceeds for his general balance (*k*) against the agent, because it is clear that the agent cannot pledge his principal's property for his own private debt; but he has a lien for the premiums and for the commission on the policy (*l*). And the principal, or his assignee, cannot recover the policy from the broker, if the factor be entitled to a lien against the principal; in such a case the broker will be considered to be holding as the servant of the factor, and will be entitled to retain in that character till the factor's claim be satisfied (*m*).

670. A banker or other person who has advanced money on a bill for a customer, or has accepted a bill for the accommodation of another, may, if his account be overdrawn, retain the bill or any money in the hands of the discountor or lender belonging to the Lien of
banker or
persons who
have made
advances on
bills.

(*d*) *Hewison v. Guthrie*, 2 Bing. N. C. 755.

(*e*) *Levy v. Barnard*, 2 J. B. Moore, 34; *Fisher v. Smith*, 4 App. Cas. 1. But as to the custom of London, see *per* TINDAL, C.J., in *Hewison v. Guthrie*, 2 Bing. N. C. 755; and see *Exp. Bosanquet*, De G. 432; *Power v. Butcher*, 5 Man. & Ry. 327.

(*f*) *Mann v. Forrester*, 4 Camp. 60; *Westwood v. Bell*, 4 Camp. 349.

(*g*) *Westwood v. Bell*, *supra*.

(*h*) *Taylor v. Kymer*, 3 B. & Ad. 320.

(*i*) *Rabone v. Williams*, 7 T. R. 360, n.; *Stracey v. Deey*, 7 T. R. 361, n.; *George v. Clagett*, 7 T. R. 359.

(*k*) *Maanss v. Henderson*, 1 East, 335; *Maspons y Hermano v. Mildred*, 9 Q. B. D. 530; affirmed (*sub nom. Mildred v. Maspons*) 8 App. Cas. 874.

(*l*) *Snook v. Davidson*, 2 Camp. 218.

(*m*) *Man v. Shiffner*, 2 East, 523.

Paragraph
670

person accommodated, to answer the outstanding bill, or until an indemnity be given against it, although the remedy on the bill itself be barred by the Statute of Limitations (*n*); and although, at the time of acceptance, the person accommodated had committed a secret act of bankruptcy upon which he was afterwards adjudicated bankrupt (*o*). And the acceptor has been allowed to retain the full amount of bills accepted, where, after they fell due and before an act of bankruptcy by the drawer, the holders of the bills, in order to relieve the acceptor from responsibility (which intention was proved), delivered up the bills to him on payment of a composition; on the ground that the bankrupt and his assignees had received the full benefit of the discharge of the bills, and that the composition was made for the relief of the acceptor (*p*).

Where property has once been appropriated to the payment of bills, though the appropriation was for the benefit of the acceptor, the holder of the bills has an equity in case of the bankruptcy (whether it be a judicial bankruptcy or not (*q*)), of the principal debtor and the person indemnified, to the benefit of the contract between them, by virtue of which he is entitled to a specific application of the fund in discharge of the bills (*r*). Such an appropriation overrides the general lien of the deposittee upon the property deposited. It has, however, been doubted whether a specific appropriation can be made when the general lien has once attached (*s*); and it is submitted that for the purpose of raising an equity in favour of the bill holder, it cannot, as he has not paid his money on the credit of such an appropriation. Where there is a direct contract with the bill holder for the application

(*n*) *Madden v. Kempster*, 1 Camp. 12; *Morse v. Williams*, 3 Camp. 418; *Bolland v. Bygrave, Ry. & Moo*, 271; *Giles v. Perkins*, 9 East, 12, per Lord ELLENBOROUGH: The London banker has a lien on a bill deposited with him, though not endorsed; whereas the country banker, who, it is said, always takes the bill indorsed, has not only a lien but a legal remedy on the bill by the indorsement. But neither has any lien till the account is withdrawn.

(*o*) *Wilkins v. Casey*, 7 T. R. 711; per Lord ELLENBOROUGH in *Willis v. Freeman*, 12 East, 656.

(*p*) *Stonehouse v. Read*, 3 B. & C. 669.

(*q*) *Powles v. Hargreaves*, 3 De G. M. & G. 430.

(*r*) *Exp. Waring, Inglis, Clarke*, 19 Ves. 345; expl. *Exp. Dever, Re Suse* (No. 2) 14 Q. B. D. 611; *Exp. Carrick*, 2 De G. & J. 208; *Bank of Ireland v. Perry*, L. R. 7 Ex. 14; *The City Bank v. Luckie*, L. R. 5 Ch. 773; *Banner v. Johnston*, L. R. 5 H. L. 167; *Vaughan v. Halliday*, L. R. 9 Ch. 561. For circumstances under which this equity is applicable see *ibid.* and *Re General Rolling Stock Co., Exp. Alliance Bank*, L. R. 4 Ch. 423; *Levi's case*, L. R. 7 Eq. 449; *Trimingham v. Maud*, L. R. 7 Eq. 201; *Exp. Smart, Re Richardson*, L. R. 8 Ch. 220; *Loder's case*, L. R. 6 Eq. 491; *Exp. Ackroyd*, 3 De G. F. & J. 726; *Exp. Dewhurst*, L. R. 8 Ch. 965; *Bank of Ireland v. Perry*, L. R. 7 Ex. 14.

(*s*) *Inman v. Clare*, Johns. 769, per Lord HATHERLEY; in which it was proved to be the custom of the cotton trade at Liverpool, that if a merchant puts cotton into a broker's hands for sale, and the broker accept a bill on account of it, which is negotiated, the proceeds of the cotton must be applied by the broker to meet the acceptances.

of the property, he of course claims independently of such an equity (*t*). Paragraphs
670—671

The drawer of bills, who has made such a deposit for the indemnity of the acceptors, cannot intercept this equity of the bill holders by setting up a lien on the deposited property in respect of a loss to him, occasioned by the improper dealings of the acceptors with other property deposited for the purpose of meeting their acceptances on his account (*u*).

671. By the general law merchant, a banker or broker is also entitled (*x*) to a lien upon bills and papers deposited with him by his customers, and which are not known to the depositors to be the property of a third person, for the general balance due from the customer, unless there be evidence that the deposit was made under special circumstances (*y*), or for special purposes, which would take it out of the general rule (**587**); and the banker's assignees in bankruptcy, by virtue of the lien, may sue the drawer of securities so deposited which are payable to the bearer (*z*). And the same principle applies to cash paid into the account of an overdrawn customer, although such cash may in fact not be his, but the property of another for whom he is merely agent. The mere fact that the customer is a professional stock broker will not put the bank on enquiry as to whether moneys paid in by him are his own moneys or the moneys of his clients (*a*). General lien
of banker
on papers,
etc., and
cash balance
of customer.

The lien will hold, though the balance of the account to the credit of which the security was placed be in favour of the customer, if another account between him and the banker be deficient (*b*); and the application by the bankers of the money advanced to the discount of particular bills, does not affect the lien for their general balance upon other securities remaining in their hands (*c*).

(*t*) See *Exp. Copeland*, 3 Deac. & C. 199; *Exp. Brown, Re Warwick*, 2 Jur. 82.

(*u*) *Exp. Carrick*, 2 De G. & J. 208.

(*x*) *Brandao v. Barnett*, 12 Cl. & Fin. 787; *Jones v. Peppercorne*, Johns. 430; *London Chartered Bank of Australia v. White*, 4 App. Cas. 413; *Wylde v. Radford*, 33 L. J. Ch. 51. The observations of KINDERSLEY, V.-C., in this case, have been taken to imply that the deposit of a conveyance of land is not a security which would be subject to the customary lien; but it may be doubted whether it was intended to make a distinction, the limits of which it would be so difficult to define, and without even suggesting the principle of it. See *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416.

(*y*) See *Re European Bank*, L. R. 8 Ch. 41.

(*z*) *Scott v. Franklin*, 15 East, 428.

(*a*) *Thomson v. Clydesdale Bank*, [1893] A. C. 282.

(*b*) *Jourdain v. Lefevre*, 1 Esp. 65.

(*c*) *Davis v. Bowsher*, 5 T. R. 488.

Paragraphs

672—673

Banker's lien
does not
apply where
property only
held by
customer
as trustee.

Banker's
lien does not
apply to
property
deposited
by way of
security for
specific sum.

672. But a banker has no lien which enables him to set off a debt due on the customer's private account against a balance standing to his credit on a trust account (*d*).

673. And, moreover, where a policy was deposited to secure a specific sum, it was held that the general lien was thereby displaced so far as that policy was concerned, and that the charge was limited to the specific debt (*e*).

(*d*) *Exp. Kingston, Re Gross*, L. R. 6 Ch. 632.

(*e*) *Re Bowes, Earl of Strathmore v. Vane*, 33 Ch. D. 586 ; and see also *Wolstenholme v. Sheffield Union Banking Co.*, 54 L. T. 746.

CANADIAN NOTES

LIEN

IN every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements, or shall be entitled or may be required to retain the land if the court is of opinion or requires this to be done according as may under all the circumstances of the case be most just, making compensation for the land, if retained, as the court may direct. R. S. O. (1897), Ch. 119, s. 30.

Where a purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title, and it was subsequently found that the purchaser had acquired only the title of a life tenant, it was held that the mortgagee was an "assign" of the person making the improvements within the meaning of sect. 30, and had a lien to the extent of his mortgage which he was entitled to enforce actively. The value of the improvements should be ascertained as at the date of the death of the tenant for life, and there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent only from that date to the date of the mortgage. Interest should be allowed on the enhanced value from the date of the death of the tenant for life^(a). When the mortgagee assigned the mortgage covenanting for payment of the mortgage money and

(a) *M'Kibbin v. Williams* (1897), 24 Ont. App. 122. As to improvements made under mistake of title see *Hislop v. Joss*, 22 Occ. N. 144; 3 O. L. R. 281.

subject to an agreement between the mortgagee and the assignee that the former might have a reassignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenant, it was held that he was entitled to a lien therefor as against the mortgagor (*b*). A mortgagee has no lien for money paid by him for taxes on the mortgaged lands or for money paid to redeem from a sale of taxes when the mortgage was the result of a fraudulent transaction, and held to be absolutely void as against the owners of the land (*c*).

A Building and Loan Company advanced money to an illiterate woman for the purpose of aiding in the construction of a house to be erected upon lands mortgaged to it to secure the loan. The mortgage contained no provision for advances to contractors, etc., as the work progressed beyond the following: "and it is hereby agreed between the parties hereto that the mortgagees their successors and assigns may pay any taxes, rates, levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens or encumbrances on the said land, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators, or assigns, and shall be payable with interest at the rate aforesaid until paid, and in default the power of sale hereby given shall be forthwith exercisable. And it is further agreed that monthly instalments in arrears shall bear witness at the rate aforesaid until paid." In a suit for redemption it was held first that the clause in this mortgage did not justify the mortgagees in making advances to contractors and persons supplying material without the express order of the mortgagor. Secondly, that the mortgagees ought not to have recognized an order in favour of the contractor for the total amount of the loan when they knew that the contractor had not completed his contract and was therefore not entitled to the money when the order contained

(*b*) *Fleming v. Palmer* (1866), 12 Gr. 226.

(*c*) *Graham v. British Canadian Loan and Investment Co.* (1898), 12 Man. L. R. 244. See as to *bonâ fide* payment to redeem land sold for taxes, *Wiley v. Ledyard*, *post*, p. 932*g*.

no name of a witness and showed that the mortgagor was unable to sign her name. The payment having been made by the loan company to a lumber company supplying material to the contractor for the building without the express authority of the mortgagor, and the lumber company having taken an assignment of the mortgage and attempted to enforce it against the mortgagor the transaction was declared fraudulent as against the mortgagor and the payment to the lumber company disallowed (*d*).

A mortgagee paying off a prior execution has a lien therefor against subsequent execution creditors (*e*). A mortgagee may become the purchaser of the equity of redemption at a sale under execution, but only on condition that he gives to the mortgagor a release of the mortgage debt, s. 32 of the Execution Act (*f*).

(32) A mortgagee of lands and tenements so sold, or the heirs or assigns of the mortgagee (being or not being plaintiff or defendant in the judgment whereon the writ of execution under which the sale takes place as issued), may be the purchaser at the sale, and shall acquire the same estate interest and rights thereby as any other purchaser, but in the event of the mortgagee becoming the purchaser he shall give to the mortgagor a release of the mortgage debt, and if another person becomes the purchaser and if the mortgagee enforces payment of the mortgage debt against the mortgagor then the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand the mortgagor may recover the debt and interest from the purchaser and shall have a charge therefor upon the mortgaged lands (*g*).

Section 28 of the Act respecting the Heir Devisee and Assignee Commission (*h*) declares that any mortgage incumbrance or lien created by the nominee of the Crown on lands for which the patent has not been issued may be registered and shall have the same force and effect and no other as if letters patent had before

(*d*) *Black v. Hiebert* (1907), 38 S. C. R. 557 (Manitoba).

(*e*) *Trust and Loan Co. v. Cuthbert* (1868), 14 Gr. 410.

(*f*) R. S. O. (1897), c. 77.

(*g*) A similar provision is in force in N. S.; R. S. N. S. (1900), c. 170, s. 16.

(*h*) R. S. O. (1897), c. 31.

the execution of such instrument been issued in favour of the grantor. Under this provision the mortgagor and mortgagee have all the rights and liabilities as between themselves that they would have if the freehold were actually vested in the mortgagor (*i*).

Where a party executing a document cannot read or write except to sign his name, even when the document is in his own language, it is held not to be executed when there is either (i.) a request that the document shall be read by the party putting it forward which is refused, (ii.) when it is misread, or (iii.) where the contents are misrepresented (*k*).

In an action for a declaration that plaintiff, the widow of John Currie, sen., deceased, was entitled to a lien or charge on certain land for moneys paid by her in satisfaction of a mortgage made by him thereon, and for sale of land in default of payment, it was held that in respect of permissive waste, plaintiff is not impeachable. As to voluntary waste, plaintiff appears to have cut and sold a considerable quantity of timber and cord-wood not in ordinary course of clearing, which was fixed at \$250, and with which she should be charged. Plaintiff held entitled to judgment declaring her entitled to a lien on the land for \$510, or so much less as may be found due to her upon the reference if defendant desire a reference and to sale in default of payment. Further directions and costs reserved (*l*). See also *Neil v. Almond* and *Price v. Wade*, *post*, p. 526*o*.

Definitions.

In Ontario the following definitions have been provided by the act respecting the law and transfer of property.

"Mortgage" shall include every instrument by virtue whereof land is in any manner conveyed assigned pledged or charged as security for the repayment of money or money's worth and to be reconveyed reassigned or released on satisfaction of the debt (*m*).

(*i*) *Watson v. Lindsay* (1879), 27 Gr. 253; 6 O. A. R. 609.

(*k*) *Letourneau v. Carbonneau* (1904), 35 S. C. R. 110, on appeal from the Territorial Court of Yukon; *Malcolmson v. Malcolmson* (1904), 3 O. W. R. 324.

(*l*) *Currie v. Currie* (1910), 5 O. W. R. 389.

(*m*) R. S. O. (1897), c. 119, s. 1, sub-s. 2.

“Mortgagor” shall include every person by whom any such conveyance assignment pledge or charge as aforesaid is made (*n*).

“Mortgagee” shall include every person to whom or in whose favour any such conveyance assignment pledge or charge as aforesaid is made or transferred (*o*).

The following definitions are to be found in the Act respecting Mortgages of Real Estate. “Property” includes real and personal property and any debt, and any thing in action and any other right or interest (*p*). “Land” includes tenements and hereditaments corporeal or incorporeal; and houses and other buildings: also an undivided share in land (*q*). “Conveyance” includes assignment, appointment, lease, settlement and other assurance and covenant to surrender made by deed, on a sale mortgage demise or settlement of any property or on any other dealing with or for any property and “convey” has a meaning corresponding with that of conveyance (*r*). “Mortgage” includes any charge on any property for securing money or money’s worth, and “mortgage money” means money or money’s worth secured by a mortgage, and “mortgagor” includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage according to his estate, interest, or right, in the mortgaged property; and “mortgagee” includes any person from time to time deriving title under the mortgage (*s*).

A testator after devising “all that I possess to be disposed of as follows” made two specific devises of land, and then bequeathed to his two sisters “all my chattels and movables and all monies on hand and monies to be received by my notes, and in case any one of my said sisters should die before me, I will and bequeath the said chattels monies and notes to the survivor.” Part of his estate consisted of a mortgage for unpaid purchase money on a sale of one of the pieces of land specifically devised or sold by him in his lifetime. It was

(*n*) Sub-s. 3.

(*o*) Sub-s. 4.

(*p*) R. S. O. (1897), c. 121, s. 1, sub-s. 1.

(*q*) Sub-s. 2.

(*r*) Sub-s. 3.

(*s*) *Re McMillan* (1902), 4 O. L. R. 415.

held that the mortgage passed under the above bequest as a chattel (*t*). "Incumbrance" includes a mortgage in fee or for a less estate, and a trust for securing money and a lien, and a charge of a portion annuity or other capital or annual sum, and "incumbrancer" has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance or to require payment or discharge thereof (*u*).

In an action *in rem* by the builders of a ship to enforce a mortgage thereon, given to them on account of the contract price for its construction, the owners for whom the ship was built, may plead as a defence *pro tanto* that the ship was not constructed according to specifications and claim an abatement of the price in consequence of such default, and that the loss in value of the ship at the time of delivery, attributable to such default, should be deducted from the claim under the mortgage (*x*).

An instrument securing repayment of a sum of money to be paid by annuities is a mortgage, and the mortgagee is entitled to the usual remedies of foreclosure and sale (*y*).

An alleged oral agreement to repay the whole of the principal by lumber was not upheld in face of the written covenant to pay in lawful money (*z*).

Thus a deed made to a party advancing money to carry out the purchase of the land who was to convey to the purchaser on repayment was held to be a mortgage (*a*). The payment of interest or the inadequacy of the purchase price will raise a presumption that the transaction was intended to be a mortgage (*b*).

M. desiring to provide for the support of a daughter E., conveyed land to his son S., and took from him a bond and mortgage conditioned for her support. The mortgage contained a proviso that S. should well and truly and

(*t*) Sub-s. 4.

(*u*) Sub-s. 5.

(*x*) *Bow, M'Laughlan and Co. v. The Camosun*, B. C. R. (1908), 40 S. C. R. 418.

(*y*) *Credit-Foncier v. Andrew* (1893), 9 Man. L. R. 65; *Rockett v. Rockett* (1902), 1 O. W. R. 309.

(*z*) *Mooney v. Provincial Trust Company* (1904), 3 O. W. R. 337.

(*a*) *Robinson v. Chisholm* (1894), 27 N. S. R. 74.

(*b*) *Bullen v. Renwick* (1862), 9 Gr. 202.

comfortably support and maintain E. S. did not comfortably maintain E., and she left the home of S., and was harboured and supported by the plaintiffs who also took out letters of administration to M.'s estate. Held, that the transaction could be treated as a mortgage; and foreclosure was accordingly granted. Semble, that if necessary a trustee could have been appointed (c).

Land of the plaintiff worth \$1500 subject to a mortgage for \$900, and other charges for \$300, was conveyed to the defendant in consideration of his paying \$140 due for instalments under the mortgage, for the recovery of which an action had been brought. The costs of the action were paid by the plaintiff. The Court, finding under the evidence that the deed, though absolute in form, was intended as a mortgage, allowed the plaintiff to redeem (d).

On the other hand, when the deed was absolute in form with no covenant for payment, and the grantee take possession, that inference will be rebutted (e).

But to induce a court to declare a deed absolute on its face to have been intended as a mortgage only, the evidence of such intention must be of the clearest, most conclusive, and unquestionable character (f).

In the case of a conveyance absolute in form of a sale but intended to express a right of repurchase, the real intention of the parties determines whether it is a mortgage or not. If the real intention of the parties be that there shall be an absolute sale subject to the right to repurchase the estate within a specified time at a fixed price, the parties will be held to their bargain. If the real intention is that the property shall be conveyed as a security only, then the transaction will be deemed to be a mortgage (g).

(c) *Kinney v. Melanson*, 40 N. S. R. 258.

(d) *Beaton v. Wilbur*, 3 N. B. Eq. 309.

(e) *Healey v. Daniels* (1868), 14 Gr. 633.

(f) *M'Micken v. Ontario Bank* (1892), 20 S. C. R. 548.

(g) *Fink v. Patterson* (1860), 8 Gr. 417; *Cayley v. McDonald* (1868), 14 Gr. 540; *Hawke v. Milliken* (1868), 12 Gr. 236; *Rapson v. Hersee* (1869), 16 Gr. 685. And see *Blunt v. Marsh et al* (1888), 1 Terr. L. R. 126; *Boardman v. Handley* (1899), 4 Terr. L. R.; *Nixon v. Curry*, 7 E. L. R. 269, and Annual Dig. Canadian Case Law, 1909. As to what is a mortgage, see *Kuming v. Melanson* (1900), 40 N. S. R. 258.

On making an advance of money it is not competent for the lender to bargain for the purchase of the property in case of default, and the mortgagee will not be allowed at the time of the loan to enter into a contract with the mortgagor for the purchase of the lands at a fixed price in case of default in payment (*h*).

In *Abell v. Porter* (1910), 12 W. L. R. 470, it was held that the lien was not lost owing to plaintiffs having acquired a title by possession.

(*h*) *Fallon v. Keenan* (1868), 12 Gr. 388.

PART IV.

OF THE RIGHTS AND REMEDIES OF THE CREDITOR.

CHAPTER	PARAGRAPH
I.—OF THE RIGHT OF THE CREDITOR TO PROTECT THE SECURITY	674—679
II.—OF ACCRETIONS TO THE SECURITY	680—684
III.—THE CUSTODY AND PRODUCTION OF THE TITLE DEEDS	685—706
IV.—OF THE GENERAL RIGHT OF THE CREDITOR TO EXERCISE HIS REMEDIES AND OF RESTRICTIONS ON SUCH RIGHTS	707—804
SECTION I.—Of the persons entitled to sue	707—811
„ II.—Of the time at which the creditor may first sue	712—726
„ III.—When the mortgagee will be restrained from suing	727—759
„ IV.—The Statutes of Limitation in relation to the rights and remedies of the mortgagee	760—800
„ V.—Of the onus cast on the creditor of proving his security	801—804
V.—OF THE CREDITOR'S PERSONAL REMEDY AGAINST THE DEBTOR	805—813
VI.—OF THE APPOINTMENT OF A RECEIVER	814—869
SECTION I.—Of the appointment of a receiver by the mortgagee	814—822
„ II.—Of the judicial appointment of a receiver	823—869
VII.—OF THE CREDITOR'S RIGHT TO TAKE POSSESSION OF THE MORTGAGED PROPERTY, AND HEREIN OF THE RELATIVE RIGHTS OF THE MORTGAGOR AND MORTGAGEE AND THEIR TENANTS RESPECTIVELY	870—924
VIII.—OF THE RECOVERY OF ANNUAL SUMS CHARGED ON LAND OR ITS INCOME	925—926
IX.—OF THE RIGHT OF THE CREDITOR TO SELL THE MORTGAGED PROPERTY	927—979
SECTION I.—Sales under powers incident to the security	927—932
„ II.—Sales under express or statutory powers	933—979

	PARAGRAPH
X.—OF THE CREDITOR'S RIGHT TO FORECLOSURE OR JUDICIAL SALE	980—1038
SECTION I.—To enforce ordinary mortgages..	980—1012
„ II.—To enforce judgment debts ..	1013—1017
„ III.—To enforce liens	1018—1019
„ IV.—To enforce bottomry bonds and other maritime securities	1020—1024
„ V.—Foreclosure or sale in bankruptcy ..	1025—1038
XI.—OF THE CREDITOR'S RIGHT TO PROVE IN BANKRUPTCY, ADMINISTRATION, AND WINDING-UP	1039—1056

CHAPTER I.

Of the right of the Creditor to Protect the Security.

	PARAGRAPH	Paragraphs
<i>Nature of Mortgagee's rights</i>	674	674—675
<i>Mortgagee's rights in relation to deterioration of the property</i>	675	
<i>Holder of bottomry bond may arrest ship if security endangered</i>	676	
<i>Companies taking possession under Lands Clauses Act</i>	677	
<i>Rights of mortgagee of leaseholds on lessee's bankruptcy and disclaimer by trustee</i>	678	
<i>Rights of mortgagees of various kinds of property to prevent injury to security</i>	679	

674. From the time of lending his money, the mortgagee, whether he be in or out of possession, acquires certain rights, by virtue of which his title, such as it may be, and so far as it depends upon his possession of the deeds, or other indicia of title, is secured against the interference of any adverse claimant; and the property itself is preserved from deterioration in the hands of the mortgagor, or of any other person to whose rights those of the mortgagee are superior.

675. As regards the estate: the court, at the instance of an equitable mortgagee, will (on sufficient ground being shown) restrain persons claiming the legal estate under voluntary conveyances from dealing with it (a). Moreover, the mortgagee may not only at all times, restrain such acts as the mining under buildings, so as to endanger their stability (b), but, if he show that the security is insufficient (that is, it seems, that the security being taken to be worth so much more than the sum advanced the act complained of will substantially impair the value which was the basis of the original contract), he may, whether his security be in fee or for a term, restrain acts which lessen its value. Such acts may consist of the removal of valuable fixtures (c), or the cutting

(a) *London and County Banking Co. v. Lewis*, 21 Ch. D. 490.

(b) *Dugdale v. Robertson*, 3 Jur. (N.S.) 687.

(c) *Ackroyd v. Mitchell*, 3 L. T. (N.S.) 236; see *Gough v. Wood*, [1894] 1 Q. B. 713; *Huddersfield Banking Co. v. Henry Lister & Son, Ltd.*, [1895] 2 Ch. 273.

Paragraphs
675—678

of timber (*d*), and even the cutting of underwood at unseasonable times, or such as is of improper growth for cutting (*e*). But as underwood is treated as the ordinary fruit of the land, the cutting of it by the mortgagor, though insolvent, and even though it be expressly included in the security, will not be prevented if it be done at seasonable times and in a husbandlike manner. Where, however, the mortgagor had been made a bankrupt, it was prevented by Lord *Eldon*, on the ground that the mortgagee's right was to have the estate left as it was at the date of the bankruptcy, and to prove for the rest of the debt (*f*); though he afterwards gave the reason that it was in the interval between the bankruptcy and the appointment of assignees, when there was no one to exercise a control over the property.

Holder of
bottomry
bond may
sometimes
arrest ship.

676. The holder of a bottomry bond may also arrest the ship after the voyage but before the bond falls due, on the allegation that she is about to leave the kingdom, or of an intention to discharge the cargo; but it will be at the risk of costs if no cause existed (*g*).

Companies
taking
possession
under Lands
Clauses Act.

677. A railway company or other public company cannot take possession of mortgaged land under the provisions of the Lands Clauses Consolidation Act (*h*), (which enables the promoters to enter upon and use lands upon depositing compensation in the bank and giving a bond), without providing for the interest of the mortgagee, as well as of the mortgagor; the former being entitled to the security of the land, and to have it protected against the acts of strangers, though he has not yet obtained any right to take possession. And the mortgagee will not be bound by a valuation and other proceedings purporting to be taken under the Act, but without his concurrence or service of notice of the proceedings upon him; though, if the company have so dealt with the property as to render it difficult to re-value it, they will not be allowed to insist upon a new valuation (*i*).

Rights of
mortgagee of
leaseholds
upon lessee's

678. The mortgagor's trustee in bankruptcy will not be allowed to affect the rights of an equitable mortgagee of a lease, by disclaiming under s. 55 of the Bankruptcy Act, 1883, and s. 13 of

(*d*) *Usborne v. Usborne*, 1 Dick. 75, and cases there; *Cox v. Goodfellow*, 8 Ves. 105, note; *Hippesley v. Spencer*, 5 Mad. 422; *Humphreys v. Harrison*, 1 Jac. & W. 581; per Lord HARDWICKE, in *Farrant v. Loval*, 3 Atk. 723; per WIGRAM, V.-C., in *King v. Smith*, 2 Hare, at p. 243; *Simmings v. Shirley*, 6 Ch. D. 173; *Harper v. Aplin*, 54 L. T. 383.

(*e*) Per Lord ELDON, *Hampton v. Hodges*, 8 Ves. 105.

(*f*) *Hampton v. Hodges*, 8 Ves. 105; *Humphreys v. Harrison*, 1 Jac. & W. 581.

(*g*) *The Jane*, 1 Dods, Ad. 461; *The Eudora*, 4 P. D. 208.

(*h*) 8 & 9 Vict. c. 18, s. 85.

(*i*) *Ranken v. East and West India Dock, etc., Rail. Co.*, 12 Beav. 298. But it was held that the company could not be restrained from keeping possession. See *Martin v. London, Chatham and Dover Rail. Co.*, L. R. 1 Eq. 145; L. R. 1 Ch. 501.

Paragraph
678bankruptcy
and dis-
claimer by
trustee.

the Act of 1890; but will be ordered to assign the lease to the mortgagee, on having a proper indemnity (*k*). Where the mortgagor is assignee of the lease, and not original lessee, and the mortgage is a legal mortgage by way of assignment of the entire term, the trustee cannot disclaim, as he is not bound by the covenants either by privity of contract or privity of estate (*l*). Where the trustee applies for leave to disclaim, and a mortgagee does not appear at the hearing of the application, the court will order that the mortgagee be excluded from all interest in, and security on, the property, unless he shall by a short date declare his option to take a vesting order in the terms of sub-s. (6) of s. 55 of the Act of 1883 (*m*). As a general rule a vesting order will only be made on condition that the mortgagee will take the lease subject, not only to future, but also to past liabilities to the lessor. But under special circumstances (*n*), the court is empowered by s. 13 of the Bankruptcy Act, 1890, if *it thinks fit*, to modify the terms prescribed by the provision in sub-s. (6) of s. 55 of the Act of 1883, so as to make the person in whose favour the vesting order is made, subject only to the same liabilities or obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order; and in a proper case the vesting order will include the whole of the property in the lease although not in the mortgage (*o*). Moreover, it is open to the lessor to take the initiative; and where the mortgage is made by way of sub-demise, the court will, on the lessor's application, exclude a mortgagee from all interest in the property, unless, within a limited time, he accepts a vesting order, which subjects him to all the liabilities which the bankrupt was subject to under the lease (*p*). And where, in order to escape this liability, the mortgagees by sub-demise, assigned their sub-term to a man of straw as trustee for themselves, it was nevertheless held that they must accept a vesting order or lose their security (*q*). If, before the intervention of the mortgagee, leave has been given to the trustee in bankruptcy to disclaim, the mortgagee should apply for an order to stay proceedings pending an appeal; as, if the disclaimer be once executed, the lessor's title will be complete, and the mortgagee's remedy will

(*k*) *Exp. Buxton, Re Muller*, 15 Ch. D. 289.

(*l*) *Re Gee, Exp. Official Receiver*, 24 Q. B. D. 65.

(*m*) *Re Parker and Parker*, (No. 1), *Exp. Turquand*, 14 Q. B. D. 405.

(*n*) *Re Walker, Exp. Mills*, 64 L. J. Q. B. 783. *Re Carter and Ellis, Exp. Savill Brothers Ltd.*, [1905] 1 K. B. 735.

(*o*) *Re Holmes, Exp. Ashworth*, [1908] 2 K. B. 812.

(*p*) *Re Cock, Exp. Shilson*, 20 Q. B. D. 343; *Re Finley, Exp. Clothworkers' Co.*, 21 Q. B. D. 475; see also *Re Walker, Exp. Mills*, 64 L. J. Q. B. 783. *Re Baker, Exp. Lupton*, [1901] 2 K. B. 628.

(*q*) *Re Smith, Exp. Hepburn*, 25 Q. B. D. 536.

Paragraphs
678—679

be gone (*r*). It has been suggested to the present editors that the security of a mortgagee by sub-demise will (notwithstanding disclaimer by the trustee in bankruptcy) be preserved to the mortgagee by virtue of the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 9), although he may have taken no steps to stay proceedings, and may even have failed to appear at the hearing of the trustee's application. The point seems never to have been expressly decided in any reported case; but in view of the language of the Bankruptcy Act, 1883, s. 55, sub-s. (6), and of the authorities referred to in the notes to this paragraph, the present editors are of opinion that the suggestion is without foundation.

Rights of
mortgagees of
various kinds
of property
to prevent
injury to
security.

679. The mortgagee's right to the preservation of his security has also been asserted by restraining the trustees of a turnpike road from reducing the tolls which formed the subject of the mortgage (*s*). A judgment creditor may be restrained, at the suit of the prior mortgagee, even before the mortgage debt has become due, from taking possession of the property under the legal right acquired by an *elegit* (*t*). On the same principle, if a company mortgage a call upon its shareholders, and, before it is received, make another call, it cannot prejudice the mortgagees by getting in the second call at the expense of the first (*u*). The principle is also applied when the security itself is the subject of litigation. The liquidator of a company has, therefore, been restrained, at the suit of a person who claimed a lien for unpaid purchase-money, from selling part of the property, the destruction or removal of which would have affected the plaintiff's interest (*x*).

(*r*) *Exp. Ditton, Re Woods*, 3 Ch. D. 459; *Exp. Sadler, Re Hawes*, 19 Ch. D. 122.

(*s*) *Lord Crewe v. Edleston*, 3 Jur. (N.S.) 128, 1061.

(*t*) *Legg v. Mathieson*, 6 Jur. (N.S.) 1010; *Wildy v. Mid-Hants Rail Co.*, 16 W. R. 409.

(*u*) *Re Humber Iron Works Co.*, 16 W. R. 474, 667.

(*x*) *Blakely v. Dent*, 15 W. R. 663.

CANADIAN NOTES

RIGHT OF MORTGAGEE TO PROTECT SECURITY

UNLESS the mortgagor prove beyond all doubt that the lands will be ample security for the mortgaged debt after the timber has been cut the Court will restrain him from cutting over the whole land (*a*). Although a mortgagor in possession will not be restrained from cutting timber for fuel, fencing and repairs upon the mortgaged premises he may be restrained at the suit of the mortgagee from felling trees for other purposes (*b*), and he may be restrained at the suit of an execution creditor (*c*). The jurisdiction as to restraining the cutting and removal of timber is not preventive only:—the Court may in a proper case interpose where the timber can be followed. Where timber is cut without any intentional wrong and there is no evidence of *mala fides* the injury actually sustained by such cutting is the measure of damage to the mortgagee of the land (*d*). And so, where timber has been sold and removed the mortgagee is entitled to be paid by the purchaser the price of the timber sold (*e*). Timber is within the provisions of the registry laws, and the registration of a mortgage is notice to a purchaser of timber standing and growing on lands included in the mortgage (*f*). The remedy of a mortgagee against a mortgagor in possession or any one claiming under him who cuts standing timber on the mortgaged premises, where such cutting will render the security insufficient is not limited to a mere prevention of the mischief by injunction, and where a second mortgagee in possession

(*a*) *M'Lean v. Burton* (1876), 24 Gr. 134.

(*b*) *Russ v. Mills* (1859), 7 Gr. 145.

(*c*) *Wason v. Carpenter* (1867), 13 Gr. 329.

(*d*) *M'Lean v. Burton* (1876), 24 Gr. 134.

(*e*) *Scott v. Vosburg* (1880), 8 P. R. 336.

(*f*) *M'Dean v. Burton* (1876), 24 Gr. 134.

had cut down timber and sold it, and subsequently in an action on the first mortgage a sale of the property proved insufficient to satisfy the amount thereof it was held that the second mortgagee was bound to account for the value of the timber cut and removed by him prior to the action (*g*). Where the security is scanty it is competent for the mortgagee himself to cut timber on the mortgaged lands to satisfy his debt (*h*). An action of trespass to vacant lands will lie by the mortgagee thereof. In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry, and was subsequently dispossessed, and the lands taken by a railway company for the purpose of their undertaking, the mortgagee was held entitled to recover the value of the land as damages to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land (*i*). Mortgagees out of possession cannot after their interest has ceased to exist maintain an action for trespass and injury to the freehold committed while they held the title (*k*).

Fraudulent Preferences.

Although a mortgagee has no right to complain of any subsequent dealing with the estate by the mortgagor, there is nothing to prevent him if his claim is left unsatisfied from suing on the covenant in the mortgage and proceeding to a sale under execution, or apply to the Court to remove any subsequent fraudulent conveyance which interferes with the realization of his claim (*l*). Mortgagees of land are not merely by reason of their position as such, creditors of the mortgagor within the statute, 13 Elizabeth, ch. 5, nor is the mortgage debt a debt within that statute unless it is shown that the mortgage security at the time of the loan was of less value

(*g*) *M'Leod v. Avery* (1888), 16 Ont. 365.

(*h*) *Brethour v. Brook* (1893), 23 Ont. 658; 21 Ont. App. 144.

(*i*) *Dalany v. Canadian Pacific Railway Co.* (1891), 21 Ont. 11.

(*k*) *Brookefield v. Browne* (1893), 22 S. C. R. 398. See also *Doe and Baxter v. Baxter* (1852), 2 All. (New Bruns.), 377.

(*l*) *Parr v. Montgomery* (1880), 27 Gr. 521, and *post*, p. 526n.

than the amount of the loan. And where shortly after the making of a mortgage the mortgagor otherwise financially able to do so made a voluntary settlement on his wife of certain property, the value of the mortgaged property at the time being greatly in excess of the amount of the loan, and being deemed by all parties to be ample security and no intention to defraud being shown, the settlement was upheld, although when the mortgage matured a sale of the property for the amount of the mortgage debt could not be effected (*m*).

Lands taken by Railway.

Where lands subject to a mortgage are taken by a railway company under a railway act the mortgagee is entitled to compensation. A mortgagor does not represent the mortgagee for the purposes of the Railway Act of Ontario, and is not included in the enumeration of the corporations or persons who under sec. 13, R. S. O. (1897), c. 207, are enabled to sell or convey lands to the company. He can only deal with his own equity of redemption and the mortgagee is entitled to have his compensation for lands taken separately ascertained (*n*). In *Scottish American Investment Co. v. Prittie* (*o*) a railway company took possession of certain lands under warrant of the County Court Judge and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs who received no notice of and took no part in the arbitration proceedings and gave no consent to the taking of possession. An award was made but was not taken up by either the railway company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure offering in their claim to take the compensation awarded and release the lands in the possession of the railway company. It was held that the railway company were proper parties to the action

(*m*) *Crombie v. Young* (1894), 26 Ont. 194.

(*n*) *In Re Toronto Belt Line Railway Co.* (1895), 26 Ont. 413. See also *Delany v. Canadian Pacific Railway Co.* (1891), 21 Ont. 11.

(*o*) (1893), 20 O. A. R. 398.

and that the plaintiffs were entitled to a judgment against all the defendants with a provision for the release of the lands in the possession of the railway company on the payment to the plaintiffs of the amount of the award.

Lands taken by Municipality.

Where land mortgaged by the owner was taken by a township council for a road and the compensation having been ascertained by award the corporation paid the amount to a creditor of the mortgagor by whom it had been attached, it was held that the mortgagee had the prior right that his mortgage being registered the corporation had notice of it, and that he was entitled to recover the amount from the corporation with costs (*p*). A mortgagee of land adjoining a highway is one of the persons in whom the ownership of it is vested for the purposes of sub-sec. 11 of sec. 640 of the Municipal Act R. S. O. (1897), c. 223, and as such is entitled to pre-emption thereunder subject to the right of the mortgagor to redeem it along with the mortgage or to have sold it to the mortgagor subject to the mortgage if the mortgagor so prefer (*q*).

Partition.

A mortgagee whose title has not been perfected by foreclosure or otherwise is not entitled to partition (*r*). A tenant in common who has mortgaged his share is entitled to partition if the mortgagee is brought before the Court (*s*). And see the Act respecting the Partition and Sale of Real Estate, R. S. O. (1897), c. 123, and the Act respecting the Law and Transfer of Property (*t*).

(*p*) *Dunlop v. The Township of York* (1869), 16 Gr. 216.

(*q*) *Brown v. Bushey* (1894), 25 Ont. 612.

(*r*) *Mulligan v. Hendershott* (1896), 17 P. R. 227; *Laplante v. Seamen* (1883), 8 O. A. R. 557.

(*s*) *McDougall v. McDougall* (1868), 14 Gr. 267.

(*t*) R. S. O. (1897), c. 119.

Fixtures.

The "fixtures" included in the meaning of the expression "personal chattels" by s. 2 of the Nova Scotia Bills of Sale Act (*u*), are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way effecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act. An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia statute, and there is now no distinction in this respect between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee (*x*). Chattels of the nature of plant or machinery not structurally affixed to the freehold as well as those of a like nature afterwards placed on the mortgaged premises, may by the express terms of a mortgage of the realty become fixtures for the purposes of the mortgage, and the mortgagee is entitled to them as against a subsequent chattel mortgagee whose security on such chattels is taken with notice of the prior incumbrance (*y*). The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures, with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold; and where articles have been only slightly affixed but in a manner appropriate to their use and showing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purpose to which they have been applied, there would be sufficient ground in a dispute between a mortgagor and his mortgagee for concluding that both as to the degree and object of the annexation they became parts of the realty (*z*). A small

(*u*) R. S. N. S. (1900), c. 142.

(*x*) *Warner v. Don* (1896), 26 S. C. R. 388.

(*y*) *The Canada Permanent Loan and Savings Co. v. The Traders' Bank* (1898), 29 Ont. 479; *Wood v. Curry* (1908), 12 O. W. R. 345.

(*z*) *Hargart v. Town of Brampton* (1897), 28 S. C. R. 174.

building of thin board, lathed and plastered inside and divided into three rooms resting by its own weight on loose bricks laid on the soil built for and used at first as a booth or shop and then for a time as a dwelling house was held to be a fixture in an action by the mortgagee of the land although the building was placed on the land after the mortgage was made by the mortgagor's husband who swore that it was placed on the land without any intention of leaving it there permanently (a). An engine used in connection with a gold mining property, was placed upon a foundation consisting of three tiers of timber laid in a pit, was held as against an execution creditor to be a fixture and to pass with the land under a mortgage of the mine (b). A chattel mortgage on *de facto* fixtures although duly filed will not prevail as against a subsequent mortgagee of the land who registers his mortgage without actual notice of the prior chattel mortgage (c). Fixtures annexed to the freehold will pass to the mortgagee on the execution of a mortgage leaseholds or freeholds although not expressly mentioned therein; and even chattels only slightly affixed have been held to pass (d). A hot-air furnace fixed to the floor by screws and placed in a dwelling-house during its construction by a mortgagor in pursuance of the agreement for the loan on the property cannot be removed by him during the currency of the mortgage. The mortgagee is entitled to an order restraining its removal, and if removed, no title to it passes as against the mortgagee, even to an innocent purchaser, and the mortgagee is entitled to an order for its replacement (e). And the mortgagee will have the same right over fixtures attached to the land whether affixed before or after the making of the mortgage (f). Where a mortgage was created on land on which was erected a steam saw mill, the mortgagor was restrained from removing the machinery out of the mill,

(b) *Don v. Warner* (1896), 28 N. S. R. 202; *Don v. Warner*, 26 S. C. R. 388.

(c) *Bacon v. Rice, Lewis and Sons* (1897), 33 C. L. J. 380.

(d) *Warner v. Don* (1896), 28 S. C. R. 388; *Keeper v. Morrill* (1881), 6 Ont. App. 121; *McCausland v. McCullam* (1882), 3 Ont. 305.

(e) *Scottish American Investment Co. v. Sexton* (1894), 26 Ont. 77; *Robinson v. Cook* (1884), 6 Ont. 590.

(f) *Dickson v. Hunter* (1881), 29 Gr. 73.

although it was alleged that the property would still remain a sufficient security, as the effect of such removal would have been to change the character of the premises (*g*). A mortgagee filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The Court thought that though the building had been actually removed it was a proper case for a mandatory injunction; but it appearing that the building had been removed piece-meal and that there might be a difficulty in restoring it, an inquiry was directed to ascertain the value thereof as sufficient for the justice of the case (*h*). A mortgagee of land is entitled to fixtures as against an execution creditor of the mortgagor. The fact that fixtures affixed to the freehold in the usual way have sometimes been mortgaged as chattels does not render them exigible to an execution against goods if at the time of the seizure the chattel mortgages are non-existent, and a mortgage of the freehold is in existence (*i*). A mortgage of lands does not require registration as a chattel mortgage as to fixtures on the land, even although the fixtures are referred to as chattels in the mortgage (*k*). In Ontario the law with regard to certain fixtures is governed by statute respecting conditional sales of chattels (*l*).

The word "plant" in a mortgage of a mill has been held not to include office furniture, or a horse and carriage used for occasional errand purposes in connection with the mill, or material kept on hand for repairs to machinery; but held to include scows used for lightering the output of the mill from its wharf to steamers, and in lightering coal for the use of the mill, and also to include such stores, as axes, shovels and files and other articles complete in themselves, used in carrying on the mill business (*m*).

(*g*) *Gordon v. Johnston* (1868), 14 Gr. 402.

(*h*) *Meyers v. Smith* (1869), 15 Gr. 616.

(*i*) *Curson v. Simpson* (1894), 25 Ont. 385; see *Rogers v. Ontario Bank* (1891), 21 Ont. 416.

(*k*) *Kitching v. Hicks* (1884), 6 Ont. 739; *Robinson v. Cook* (1884), 6 Ont. 590; *Thomas v. Inglio* (1885), 7 Ont. 588; *Stevens v. Barfoot* (1886), 13 Ont. App. 366.

(*l*) R. S. O. (1897), c. 149.

(*m*) *Eastern Trust Co. v. Cushing Sulphite Fibre Co.*, 3 N. B. Eq. 378; 3 E. L. R. 28.

CHAPTER II.

Of Accretions to the Security.

	PARAGRAPH	Paragraphs
<i>General right of mortgagee to accretions</i>	680	680—681
<i>Puisne mortgagee takes benefit of discharge of prior mortgage unless kept alive for benefit of mortgagor</i>	681	
<i>Mortgagee's security attaches to renewed lease or other substituted title</i> ..	682	
<i>The young of pledged animals accrue to the security</i>	683	
<i>Mortgagor entitled to renewed lease obtained by mortgage</i>	684	

680. The mortgagee, whether legal or equitable, will be entitled, for the purposes of the security, to all such interests as may be acquired, either as accretions to, or in place of his original interest. If, therefore, the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee, of copyholds held of the manor, they will enure to the mortgagee's benefit; and the lord cannot lessen the security by alienating them (*a*). And all incidental rights, such as the goodwill of a business carried on upon and inseparably connected with the mortgaged property, and compensation for such goodwill when the property is taken compulsorily, will follow the security (*b*), unless the goodwill is owing to the personal skill of the mortgagor (*c*). Although, however, this is so as between mortgagor and mortgagee the same rule will not be applied to the equity of redemption; so that where on the death of the mortgagor the property is sold with the concurrence of all parties interested, the goodwill being priced separately, the heir or devisee will have to bear the whole of the mortgage debt under Locke King's Acts, but the next of kin will take the whole of the price attributed to the goodwill (*d*).

681. Upon the discharge by the mortgagor, of a prior mortgage, a puisne mortgagee will have the full benefit of the security discharged from the prior incumbrance (*e*) (**1530**). But, of course, this will not apply where, on the discharge of the debt, it is transferred under s. 15 of the Conveyancing and Law of Property Act, 1881. Whether where such

(*a*) *Doe d. Gibbons v. Pott*, 2 Dougl. 709.

(*b*) *Chissum v. Dewes*, 5 Russ. 29; *Pile v. Pile*, 3 Ch. D. 36.

(*c*) *Cooper v. Metropolitan Board of Works*, 25 Ch. D. 472.

(*d*) *Re Bennett, Clarke v. White*, [1899] 1 Ch. 316.

(*e*) *Exp. Bisdee*, 1 Mont. D. & De G. 333; and see *Re Gibbon, Moore v. Gibbon*, [1909] 1 Ch. 367.

Paragraphs
681—684

unless
transferred
at request of
mortgagor.

Mortgagee's
security
attaches to
renewed
or other
substituted
title.

Young of
pledged
animals
accrue to the
security.

Mortgagor
entitled to
renewed
lease
obtained by
mortgagee.

transfer is made to a mere trustee for the original mortgagor, the puisne mortgagee is entitled to the full benefit of the property discharged from the prior mortgage may be questionable, but on principle it is submitted that he is. With regard to discharge of a prior incumbrance by a *purchaser* of the equity of redemption, see (1528—1530), *supra*.

682. So, in the case of a mortgage of or charge upon leaseholds, if a new lease or other interest of a like nature be obtained (*f*) by the mortgagor or his representative or successor, either on a forfeiture (by any contrivance or otherwise) of the original lease, or by other means, the owner of the mortgage or charge will have the benefit for the purpose of the security, whether he be a volunteer or a purchaser for valuable consideration, and although money was expended by a volunteer in obtaining the new interest. And, even at law, a mortgagor could not set up against his mortgagee a title which he had acquired after the mortgage from a person who had ejected him (*g*).

683. The same law applies to a pledge, by which not only the thing itself, but also, as accessory, the natural increase thereof passes. Such is the case of the young of sheep born after the pledge of the flock (*h*). But by the terms of a mortgage of sheep with the issue, increase and produce thereof, only the increase and issue of the specified sheep and not such as are substituted for them will pass (*i*).

684. On the other hand, if the mortgagee of a term obtain a renewal, the mortgagor shall generally have the benefit of the new term, upon redemption; because the term comes from the same root, and is subject to the same equity (*k*).

The rule of course applies with greater force where the new lease has been obtained by any improper practice (*l*). But where it was obtained, not by any contrivance nor during the possession of the mortgagee, and the mortgagor had given notice that he would not redeem the lease which had been forfeited, a mortgagee was held entitled to retain the new lease (*m*).

(*f*) *Moody v. Matthews*, 7 Ves. 174; *Nightingale v. Lawson*, (1 Bro. C. C. 440) cited there; *Hughes v. Howard*, 25 Beav. 575; *Sims v. Helling*, 21 L. J. Ch. 76; see *Yem v. Edwards*, 3 Jur. (N.S.) 462; *Trumper v. Trumper*, L. R. 8 Ch. 870; *Leigh v. Burnett*, 29 Ch. D. 231. But where a sale by an execution creditor had been delayed by the court to prevent the loss which would have arisen from a forced sale, and additions were afterwards made to the property, it was held that the creditor, getting the benefit of the increased value on sale, could not claim the value of the additions without allowance for labour and costs. (*Re Hill Pottery Co.*, 15 W. R. 97.)

(*g*) *Doe d. Ogle v. Vickers*, 4 Ad. & EL. 782.

(*h*) *Story*, Bailm. § 292; Dig. xx., tit. 1, De Pignoriis, &c., xiii.

(*i*) *Webster v. Power*, L. R. 2 P. C. 69.

(*k*) *Rakestraw v. Brewer*, 2 P. Wms. 511; and see *Taster v. Marriott*, Ambl. 668; *Rave v. Chichester*, Ambl. 715; *Owen v. Williams*, Ambl. 734; *Lee v. Vernon*, 5 Bro. P. C. 10; *Pickering v. Vowles*, 1 Bro. C. C. 197; *Rushworth's Case*, Freem. 13.

(*l*) See *Fitzgerald v. Rainsford*, 1 Ba. & Be. 37, note.

(*m*) *Nesbitt v. Tredennick*, 1 Ba. & Be. 29.

CHAPTER III.

Of the Custody and Production of the Title Deeds.

	PARAGRAPH	Paragraph
<i>General right of mortgagee to title deeds of his mortgagor</i>	685	685
<i>Special grant of deeds in mortgage may have some advantages</i>	686	
<i>Mortgagor getting lawful possession of title deeds said to have the right to retain them as against mortgagee</i>	687	
<i>Tenant for life entitled to deeds relating to freehold as against mortgagee of a term</i>	688	
<i>Mortgagor's right to inspect deeds where mortgage made since 1881</i> ..	689	
<i>No such right where mortgage made prior to 1882</i>	690	
<i>Right of inspection given by Conveyancing Act, 1881, to persons whose property is subject to a lien</i>	691	
<i>Right of such persons prior to that Act</i>	692	
<i>Production of documents under 14 & 15 Vict. c. 99 and Bankruptcy Act</i>	693	
<i>Even prior to 1882 production of the mortgage deed was enforced where fraud suspected</i>	694	
<i>Under old law mortgagee of part of estate not bound to say what part his mortgage affected</i>	695	
<i>Under old law transfer pending a redemption suit in order to hamper it was no ground for production</i>	696	
<i>Mortgagee's old right to sit on deeds did not extend to cases where third parties would be affected</i>	697	
<i>Application of old rule to colonial mortgages</i>	698	
<i>Old rule applied even where mortgagor was selling to raise the debt unless with mortgagee's consent</i>	699	
<i>Statutory right to production only applies to documents in mortgagee's custody or power</i>	700	
<i>Quære whether old law applied to the mortgage deed itself or only to muniments prior to it</i>	701	
<i>Where mortgagor's title bad, mortgagee will not be ordered to produce mortgage deed to rightful claimants</i>	702	
<i>Former practice as to proving mortgage deed in redemption suit</i>	703	
<i>Mortgagee of vested remainder may insist on inspecting deeds in possession of tenant for life</i>	704	
<i>Right of remainderman to inspect pledged heirlooms</i>	705	
<i>Right of surety to discovery</i>	706	

685. As regards the title deeds. The mortgagee in fee of freeholds is entitled to hold the deeds (*a*), and may sue for them in *trover* or *detinue*; but a mere termor for years, whatever be the length of his term, has no right, except under a special

General right of mortgagee to title deeds of his mortgagor.

(*a*) *Austin v. Croome*, Car. & M. 653; *Harrington v. Price*, 3 B. & Ad. 170.

Paragraphs
685—687

contract, to require the delivery to him of the deeds relating to the freehold (*b*). The right of the mortgagee of the life estate of a tenant for life, to the possession of the deeds will, of course, like that of his mortgagor, be subject to the right of the remainderman to have them brought into court, or otherwise secured for the benefit of the persons interested in their safe custody, and entitled to inspect them (*c*). But this would of course not apply to the mortgagee of the fee under a mortgage created by the tenant for life under the powers of the Settled Land Act or otherwise.

Special grant
of deeds

686. It was formerly the custom to insert in conveyances a special grant of or covenant to deliver the title deeds of the property. This has fallen into disuse, as unnecessary where the deed deals with the inheritance of the estate; and it clearly appears to be so for the purpose of giving a right to possession of the deeds, against a person who is altogether without the title to hold them; as, if one who has wrongfully obtained possession of the deeds pledges them, in which case the pledgee acquires no good title against the lawful owner (*d*) (197).

It appears, however, that for want of a special grant of the deeds, the mortgagee may lose his right to them, where they have come into possession of a person who has some interest in the estate to which they relate. Thus, where the purchaser of a small part of the estate took from the vendor a covenant for the production of the deeds, which were in the hands of a mortgagee of the rest of the property, and afterwards became possessed of them as assignee of the mortgage, which he again assigned without any grant of the deeds, and retained them; it was held (*e*), that the assignee could not recover them in *trover*, because, for want of an express grant, he could not show a better title than the assignor. And, conversely, where a forged copy of a true deed was delivered to a first mortgagee, who *had* a covenant for delivery of all deeds, it was held that he might recover the true deed in *detinue* or *trover*, against a subsequent equitable mortgagee with whom it had been deposited (*f*).

Mortgagor
who lawfully
gets possession
of deeds

687. The doctrine of *Yea v. Field* was also recognized in a later case (*g*), in which it is said to have been laid down, that though the mortgagee of a term, under a security in which the

(*b*) *Wiseman v. Westland*, 1 Y. & J. 117; see *Opie v. Godolphin*, Pre. Ch. 548; *Knight v. Knight*, 1 L. J. (N. S.) Ch. 125; but the concluding observations of the Master of the Rolls are probably misreported; *Jenner v. Morris*, L. R. 1 Ch. 603.

(*c*) As to which, see Sugd. V. & P. 444, ed. 14; Davidson's Conveyancing, vols. 1 and 2; Lewin on Trusts, p. 511, ed. 7; *Garner v. Hannington*, 22 Beav. 627; *Jenner v. Morris*, L. R. 1 Ch. 603. By the Building Societies Act, 1874 (c. 42), s. 16, (11), the rules of the society shall contain provisions for the custody of mortgage deeds and other securities belonging to the society.

(*d*) *Hooper v. Ramsbottom*, 6 Taunt. 14.

(*e*) *Yea v. Field*, 2 T. R. 708.

(*f*) *Newton v. Beck*, 3 H. & N. 220.

(*g*) *Davies v. Vernon*, 6 Q. B. 443.

deeds were expressly mentioned, having no other interest in the estate, was bound to deliver the deeds to an assignee of the mortgage, yet not having done so, and having afterwards delivered them to the mortgagors, the latter might lawfully retain them in respect of the equity of redemption, even against a subsequent mortgagee of the fee in whose security they were not expressly mentioned.

Paragraphs
687—689

may retain
them as
against
mortgagee.

This doctrine that the wrongful delivery of the deeds by the assignor of the term to the mortgagors, gave a right of possession, not only against the assignee of the term who was admitted to be entitled to them, but also against the subsequent mortgagee in fee, because he had not expressly contracted for them, appears startling, and goes further than was necessary, having regard to the circumstances of the case.

The mortgagors were husband and wife, who mortgaged under a power of appointment, and the deeds were in the hands of a person with whom the husband, (being only tenant for life of the estate), had deposited them before the date of the mortgage in fee; the deposittee claiming to hold them after the husband's death against the wife, then owner in fee, subject to the mortgages. As against the holder of the deeds, (who at that time was a stranger to the estate), the owner of the equity of redemption might well have sufficient title to recover them. It seems, however, from the cases cited above, to be doubtful whether the general practice of omitting all mention of the deeds in securities relating to the inheritance is well founded.

688. Where the tenant for life of the mortgaged estate was entitled (the mortgage being for a term) to hold the deeds, but had brought them into court for the purposes of a suit, the court refused to re-deliver them without the mortgagee's consent on the ground that he had previously taken some of them out of the jurisdiction. But *Turner*, L.J., thought they ought to be re-delivered to the tenant for life, upon his giving security for their safe custody on the estate, and for their production and return into court if ordered (*h*).

Tenant for
life generally
entitled to
deeds relating
to freehold as
against
mortgagee of
a term.

689. As to mortgages made after December 31st, 1881, and notwithstanding any stipulation to the contrary, the mortgagor, (that is, any person entitled to redeem), is entitled at reasonable times, on his request and at his own cost, and on payment of the mortgagee's costs and expenses, to inspect and make copies or abstracts of, or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee (*i*).

Mortgagor's
right to
inspect
where mort-
gage made
since 1881.

(*h*) *Jenner v. Morris*, L. R. 1 Ch. 603.

(*i*) Conveyancing and Law of Property Act, 1881, c. 41, s. 16.

Paragraphs
690—691

No such right
where
mortgage
made prior
to 1882.

690. But as to mortgages made before the above date, the mortgagee, whether legal or equitable, cannot be compelled to deliver up possession of the deeds or other documents of title in his possession, until actual payment or tender of all that is due to him for principal, interest, and costs; payment into court of the largest sum that can be due being insufficient (*k*). Except under specified circumstances, he cannot even be compelled to produce them on subpœna (*l*); and where the mortgage was made under a power, the persons entitled in remainder, subject to the power, have no more right to production than any other persons entitled to redeem (*m*). If documents be in the possession of persons who would be bound to produce them, (as in the case of a trustee), or one of several tenants in common, the liability to production will cease when the original character of the holder is exchanged for that of a mortgagee (*n*); as, on the other hand, the holder of the deeds will lose his privilege by the discharge of the mortgage (*o*).

And although it was said a fair mortgagee would not deny an inspection of deeds in his hands when he had notice to be paid off (*p*), he was not bound to allow it. Even if the validity of the deed were disputed, and it were sought to set it aside, (without an allegation that the deed would disclose the fraud, and without any other special case for production being made), the mortgagee who denied notice would not be ordered to produce his security for the inspection of a person claiming to redeem (*q*); although by his pleadings the defendant had, for certainty, craved leave to refer to the document (*r*) when produced. The right to withhold production of deeds extended to drafts or copies of them which would equally disclose the mortgagee's title (*s*). And no order would be made for inspection by strangers to the suit with whom the mortgagor was in treaty for a loan to enable him to discharge the mortgage (*t*).

Right to
inspect of
persons

691. As to liens, it is considered that by force of the word "charge" in the interpretation clause of the Conveyancing and

(*k*) *Senhouse v. Earl*, 2 Ves. Sen. 450; *Sparke v. Montriou*, 1 Y. & C. Ex. 103; *Postlethwaite v. Blythe*, 2 Swans, 256; *Browne v. Lockhart*, 10 Sim, 420; *Greenwood v. Rothwell*, 7 Beav. 291; *Schlenker v. Mozey*, 1 Car. & P. 178; *Mills v. Oddy*, 6 Car. & P. 728.

(*l*) *Doe d. Bowdler v. Owen*, 8 Car. & P. 110; *Doe v. Ross*, 7 Mee. & W. 102, 122.

(*m*) *Chichester v. Marquis of Donegall*, L. R. 5 Ch. 497.

(*n*) *Lambert v. Rogers*, 2 Mer. 489; *Johnston v. Tucker*, 11 Jur. 382.

(*o*) *Cannock v. Jauncey*, 1 Drew. 497.

(*p*) *Thornhill v. Evans*, 2 Atk. 330, per Lord HARDWICKE.

(*q*) *Crisp v. Platel*, 8 Beav. 62; *Dendy v. Cross*, 11 Beav. 91; *Bassford v. Blakesley*, 6 Beav. 131; *Senhouse v. Earl*, *supra*; *Perrat v. Ballard*, 2 Ch. Ca. 73.

(*r*) *Howard v. Robinson*, 5 Jur. (N.S.) 136.

(*s*) *Bycroft v. Sibel*, 1 W. R. 96.

(*t*) *Damer v. Earl of Portarlington*, 15 Sim. 380.

Law of Property Act, 1881, s. 2 (vi.), a person entitled to a non-possessory lien on property, is in the same position as a mortgagee under the Act; but that the holder of a chattel under a possessory lien, which is a mere right of detainer, is not within the Act.

Paragraphs
691—693

whose property is subject to a lien since Conveyancing Act, 1881. Rights of such persons before that Act.

692. Before the Act, the privilege of refusing production extended generally to securities held by creditors, and as well to documents upon which, by the custom or practice of a trade or profession, the holder has a lien for the value of his services (such a lien being equivalent to a special contract), as to documents expressly delivered for the purpose of security (*u*); but it appears in some cases to have been treated as less extensive in the ordinary possessory lien than in that of the solicitor, which has already been considered (**648-653**). So that a broker claiming a lien on a policy for premiums, has been compelled to produce it on behalf of the assured in an action against the underwriters (*x*); and it has been laid down, that this liability applies to such a lien as that of the carrier, the manufacturer, and the warehouseman or wharfinger (which does not deprive the owner of the right of inspection so long as he does not interfere with the possession), as distinguished from the lien of the attorney or solicitor (*y*). But in another case an order to compel a witness to produce a deed, upon which he claimed a lien as against the party who required production, was refused at *Nisi Prius* (*z*).

And, as in the case of a solicitor, the claim of the holder of a document to retain it under a lien would not enable him to resist production, if the object of the suit were to impeach or to recover the possession of the document itself (*a*).

693. An order will be made under the Act to amend the law of evidence, 14 & 15 Vict. c. 99, s. 6, for the inspection of books and documents in the possession of a person claiming a lien upon property, where reasonable ground is laid before the court for believing that the documents do not contain evidence in support of the case of the person in possession of it, but are material evidence for the person who seeks production (*b*). And a solicitor, notwithstanding a claim to a lien on documents of a bankrupt for work done before the bankruptcy, will be ordered to produce them for

Production of documents under 14 & 15 Vict. c. 99, and Bankruptcy Act.

(*u*) *Richards v. Platel*, Cr. & Ph. 79; *Griffith v. Ricketts*, 7 Hare, 299. The remark of TURNER, L.J., in *Hope v. Liddell*, 7 De G. M. & G. at p. 339, was probably not intended to raise a doubt on this point.

(*x*) *Hunter v. Leathley*, 10 B. & C. 858.

(*y*) *Hunter v. Leake*, 7 L. J. (o.s.) K. B. 221; and see *Thompson v. Moseley*, 5 Car. & P. 501.

(*z*) *Kemp v. King*, Car. & M. 396; and see *R. v. Hankins*, 2 Car. & K. 823.

(*a*) *Beckford v. Wildman*, 16 Ves. 438; *Fencott v. Clarke*, 6 Sim. 8; *Lord Brougham v. Cauvin*, 16 W. R. 688.

(*b*) *Scott v. Walker*, 2 El. & Bl. 555.

Paragraphs 693—694 the inspection of the trustee, under the provisions of the Bankruptcy Acts relating to discovery of the debtor's property (c).

Prior to 1882 production of mortgage deed enforced where fraud suspected.

694. A mortgage deed might, under the old law, be ordered to be produced, where, from admissions in the pleadings, the existence between the parties of the relation of solicitor and client, or other circumstances, the court considered that suspicion of fraud or other circumstances would warrant it (*d*). Thus, where a judgment creditor impeached prior securities on the ground of fraud, (which was suspected because the beneficial enjoyment of the goods, which were the subject of the prior security, was in the mortgagor, though another person was said to be in legal possession), production of the prior security was ordered (*e*). So, if the answer professed to set out the document of which production was required and in which the plaintiff had established an interest; or if, from the date recitals, or other circumstances, the alleged fraud would be apparent on the very face of the instrument (showing, for instance, that a security was effected after the insolvency of the mortgagor); or by false representations of the amount due to a prior mortgagee; or that an alleged judgment debt has been discharged; production would be ordered (*f*). And so, where it was alleged that inspection of the deed would show that the signature of the receipt was procured by fraud, and there was only a general denial of notice, and no denial of the particular circumstance in question (*g*). And a mortgagee who had taken a conveyance of the equity of redemption from a trustee, with notice of the trust, was bound to produce the conveyance in a suit by the *cestui que trust* for redemption, though one of the trusts was for sale (*h*).

If a mortgagee pleaded the Statute of Limitations (*i*), he was also in the same position, as to the liability to produce his deeds, as any other defendant who cannot shelter himself under a mortgage title.

But note, that to get a right to production in these cases, the plaintiff must have established an interest in the deeds (*k*). Where no interest was shown, and the liability to disclosure was

(c) *Re Toleman and England, Exp. Bramble*, 13 Ch. D. 885; s. 96, Act of 1869; s. 27, Act of 1883.

(d) *Gill v. Eyton*, 7 Beav. 155; *Bassford v. Blakesley*, 6 Beav. 131; *Davis v. Parry*, 4 Jur. (N.S.) 431; see *Mills v. Finlay*, 1 Beav. 560; *Patch v. Ward*, L. R. 1 Eq. 436.

(e) *Neate v. Latimer*, 2 Y. & C. Ex. 259; affirmed (*sub nom. Latimer v. Neate*), 4 Cl. & F. 570.

(f) *Neate v. Latimer*, *supra*, and *Latimer v. Neate*, *supra*, explained in *Glover v. Hall*, 2 Ph. 484; *Phillips v. Evans*, 2 Y. & Coll. C. C. 647; and see form of order, at p. 650; *Hunt v. Elmes*, 5 Jur. (N.S.) 645; *Cannock v. Jauncey*, 1 Drew. 497.

(g) *Kennedy v. Green*, 6 Sim. 6.

(h) *Smith v. Barnes*, L. R. 1 Eq. 65.

(i) *Parkinson v. Chambers*, 1 Kay & J. 72.

(k) *Latimer v. Neate*, *supra*.

contested, even the statement of the substance of the deed gave no title to production (*l*).

Paragraphs
694—697

695. A mortgagee admitting by his pleadings that he was mortgagee of part of certain estates, without saying of what part, and standing upon his right to refuse production, was not bound to disclose the contents of the deed, by answering further of what part he is mortgagee (*m*). And even though it were alleged that a deed was wrongfully set up as a mortgage, the defendant could have protected himself against production, by insisting on his title as mortgagee, though if he claimed under another title he must have produced the deed (*n*).

Under old law mortgagee of part of estate not bound to state of what part he was mortgagee.

696. It was not a reason for ordering production against the mortgagee or his assignee, that the assignment was made *pendente lite* for the purpose of hampering the redemption (*o*); or that by reason of a transfer of the mortgage, or of a devolution by devise, or descent of the equity of redemption, the person redeeming did not know the nature of the particulars of the deed under which the assignee claimed to be entitled, or the extent of his claim; nor would the latter circumstance entitle him to have a copy of the deed even at his own cost. The assignee is bound to procure all proper parties to join in the reconveyance, and the extent and validity of his claim may be ascertained, in the foreclosure suit, by an application to the court for an account of principal and interest under the statute 7 Geo. 2, c. 20 (*p*) (**746**).

Under old law assignment *pendente lite* to hamper redemption, no ground for production of documents.

697. A mortgagee was always bound to produce a deed which his mortgagor was under an express or implied trust to produce; as if a lease be executed by both parties, of which there is no counter-part—for such a lease carries notice of an implied trust on the lessee's part to produce it at the lessor's request, and the lessee's mortgagees are bound also. So if the assignee of the lessor require the production of the mortgaged lease in aid of an action on the covenants (*q*). And on similar grounds a trustee mortgagee is bound, in an administration action, to produce the title deeds to his *cestuis que trust*, and cannot set up any supposed breach of confidence towards the mortgagor in so doing (*r*). Conversely the mortgagor who has returned copies of the title deeds for his own purposes and not as trustee for the mortgagor, cannot excuse himself from producing them to third parties on the ground of any duty towards

Mortgagee's former right to refuse production did not extend to cases where third parties affected.

(*l*) *Glover v. Hall*, 2 Ph. 484; and see *Sampson v. Swettenham*, 5 Mad. 16; *Tyler v. Drayton*, 2 Sim. & St. 309; *Lloyd v. Wait*, 12 Sim. 103.

(*m*) *Addison v. Walker*, 4 Y. & C. 442.

(*n*) *Jones v. Jones*, Kay, App., vi.

(*o*) *Gill v. Eytton*, 7 Beav. 155.

(*p*) *Lewis v. Davies*, 17 Jur. 253; *Browne v. Lockhart*, 10 Sim. 420.

(*q*) *Doe d. Morris v. Roe*, 1 Mee. & W. 207; *Balls v. Margrave*, 4 Beav. 119.

(*r*) *Gough v. Offley*, 5 De G. & Sm. 653.

Paragraphs
697—701

the mortgagee (*s*), nor take advantage of the mortgagee's privilege to excuse himself from giving evidence of the contents of the mortgage (*t*).

Application
of old rule
to colonial
estates.

698. The old rule as to production, like other rules of abstract justice, applied to the production of title deeds of a colonial estate subject to foreign law, unless it appeared that the foreign law upon the subject differed from that of England (*u*).

Old rule
applied even
where it was
intended to
raise the debt
by sale.

699. The rule also applied where it was intended to raise the mortgage money by sale (*x*). But in an administration suit, where mortgagees had consented to a sale of the estate, and had produced the deeds for the purpose of comparison with the abstract (which it was declared they were bound to do under the circumstances), it was held, that as they were to be paid off out of the purchase-money, and the transaction could not be completed until delivery of the deeds, they must bring the deeds into court. But it was ordered that they should not be delivered out without notice to the mortgagees (*y*).

Statutory
right to
production
only
applies to
documents in
mortgagee's
custody or
power.

700. It will be observed that the statutory right applies only to those which are in his custody or power: but the mere statement by the mortgagee that they have been pledged by him, is not inconsistent with the power to obtain production, and will therefore not be sufficient (*z*). Nor, if ordered to produce them, is it sufficient to say that they are not in his possession or power, when they are in the possession of his solicitor in that character (*a*). But it is otherwise, if the solicitor holds them as a solicitor of different persons, who are not represented by the person required to produce, and the latter swears that they are not in any way in his possession or power, or under his control (*b*).

Quære
whether
under old law
mortgagee
bound to
produce
mortgagee
deed.

701. It seems to have been considered that the mortgagee's right, before the Act, to resist production was confined to the title deeds of the estate, and did not extend to the mortgage deed itself; on the ground that the mortgage deed, which puts him in the character of mortgagee, and without which he could not resist the production of the title, must always remain open to the inspection of the mortgagor, that he might know his right to redeem (*c*).

But the authority upon which the supposed exception chiefly

(*s*) *Hercy v. Ferrers*, 4 Beav. 97.

(*t*) *Marston v. Downes*, 1 Ad. & El. 31.

(*u*) *Bentinck v. Willink*, 2 Hare, 1.

(*x*) *Senhouse v. Earl*, 2 Ves. Sen. 450.

(*y*) *Livesey v. Harding*, 1 Beav. 343.

(*z*) *Rogers v. Rogers*, 6 Jur. 497.

(*a*) *Fenwick v. Reed*, 1 Mer. 114; *Bligh v. Berson*, 7 Price, 205.

(*b*) *Palmer v. Wright*, 10 Beav. 234.

(*c*) 2 Ca. & Op. 53; and see *Anon.*, Mosley 246; *Exp. Caldecott, Re White*, Mont. 55.

rested has been doubted (*d*) ; and the exception was not generally adopted in modern practice, as appears by the numerous reported cases (*e*) concerning the production of the mortgage deed. It was, however, afterwards held that the mortgagee was bound to produce the mortgage deed (*f*) ; and production of it was ordered in bankruptcy, under the powers given by the Bankruptcy Act, 1861, to require the production of documents in the custody of persons concerned in dealings with the bankrupt, and which appear necessary to the full disclosure of the debtor's transactions and affairs (*g*). The Court of Queen's Bench also, under the Act to amend the Law of Evidence (*h*), made an order for inspection of a memorandum of deposit by way of equitable mortgage, in favour of plaintiffs claiming under the depositor of the deeds, and suing for them in detinue (*i*). The order was considered by one of the learned judges to be justified by the case of *Latimer v. Neate* (*k*), in which, however, the instrument ordered to be produced, and alleged to be a mortgage, had been set up by the defendant as conferring an absolute title, and was impeached for fraud (**694**).

Paragraphs
701—703

702. If a mortgagee have taken a bad title, and an action be brought against him for discovery and delivery of the deeds, the order will not extend to the mortgage deed, because he may still recover his right by means of it (*l*) (**408**).

Where title of mortgagor bad, mortgagor will not be ordered to produce mortgage deed to rightful claimants.

As the object of the mortgagee's privilege is to prevent disclosure of the contents of his title deeds, production may be compelled for the mere purpose of inspecting an indorsement or other mark, for the mere purpose of identification (*m*).

703. In a redemption suit, the mortgagee might formerly be ordered to produce the deed at the hearing, for the purpose of proof ; but the plaintiff was not allowed to see it for any other purpose, or to have it left with the officer of the court (*n*). Production before the examiner for the purpose of proof might also

Former practice as to proving mortgage deed in redemption suit.

(*d*) *Browne v. Lockhart*, 10 Sim. 420.

(*e*) See *Crisp v. Platel*, 8 Beav. 62 ; *Dendy v. Cross*, 11 Beav. 91 ; *Gill v. Eytton*, 7 Beav. 155 ; *Lewis v. Davies*, 17 Jur. 253, and others.

(*f*) *Patch v. Ward*, L. R. 1 Eq. 436.

(*g*) *Re Mark's Trust-Deed*, L. R. 1 Ch. 429 ; under 24 & 25 Vict. c. 134, s. 189. See Bankruptcy Act, 1883, s. 27. And see *Exp. Beeston*, Mont. and Mc. A. 244, on the like provision in the statute 6 Geo. 4, c. 16 ; and see *Exp. Poole*, 1 Ves. Jun. 160, where an order on the mortgagee, whose title was affected by the bankruptcy, to deliver the deeds, was refused in bankruptcy.

(*h*) 14 & 15 Vict. c. 99, s. 6, which enables the courts and judges of the courts of common law to order inspection, where, previous to the passing of the Act discovery might have been obtained by filing a bill or other proceeding in equity at the instance of the party applying.

(*i*) *Owen v. Nickson*, 7 Jur. (N.S.) 497.

(*k*) 4 Cl. & Fin. 570, explained *Glover v. Hall*, 2 Ph. 484.

(*l*) *Opie v. Godolphin*, Pre. Ch. 548.

(*m*) *Phelps v. Prew*, 3 El. & Bl. 430.

(*n*) *Beaumont v. Foster*, 5 L. J. (N.S.) Ch. 4 ; *M'Comb v. —*, 5 L. J. (N.S.) Ch. 2.

Paragraphs
703—706

be ordered (*o*), without prejudice to the question as to production at the hearing. And bills and notes, admitted to be in the mortgagee's possession, and constituting his evidence, and also vouchers and accounts, will be ordered to be produced for inspection, either in a suit for redemption or administration, and were not within the old rules concerning evidences of title (*p*).

Mortgagee of vested remainderman may insist on inspecting title deeds of estate.

704. The mortgagee of the remainderman who has a vested (but not of one who has only a contingent (*q*)) interest, and whose title is clear and free from reasonable cause of litigation, may sue the tenant for life for production and inspection of the title deeds; and if it be suggested that the production is required for an improper purpose, the burthen of proving the assertion lies on the person who resists the production (*r*).

Right of remainderman to inspect pledged heirlooms.

705. Inspection of chattels settled as heir-looms, has been ordered against a person claiming a lien upon them under the tenant for life, on the application of the trustees of the will in a suit for delivery of the chattels (*s*).

Right of surety to discovery.

706. In a suit by a puisne mortgagee for redemption of a prior mortgage, the plaintiff, alleging that he is only surety for the debt, is entitled to discovery from the defendant as to what securities were held by him from the alleged principal, of which the plaintiff may be entitled to the benefit (*t*).

(*o*) *Sparke v. Montriou*, 1 Y. & C. Ex. 103.

(*p*) *Gibson v. Hewett*, 9 Beav. 293; *Freeman v. Butler*, 33 Beav. 289.

(*q*) *Noel v. Ward*, 1 Mad. 322.

(*r*) *Davis v. Earl of Dysart*, 20 Beav. 405.

(*s*) *Macclesfield v. Davis*, 3 Ves. & B. 16.

(*t*) *Bridgewater v. De Winton*, 9 Jur. (N.S.) 1270.

CHAPTER IV.

Of the General Right of the Creditor to exercise his Remedies, and Restrictions on such Right.

	PARAGRAPH	Paragraph
Section I.—Of the Persons entitled to Sue	707—711	707
„ II.—Of the Time at which the Creditor may first Sue	712—726	
„ III.—When the Mortgagee will be restrained from Suing	727—759	
SUB.-SECT. (1).—UNDER THE INHERENT JURISDICTION OF THE COURT AS MODIFIED BY STATUTE AND RULES OF COURT	727—752	
„ (2).—UNDER THE BANKRUPTCY ACT	753—754	
„ (3).—UNDER THE COMPANIES ACTS	755—757	
„ (4).—UNDER THE JUDGMENT ACTS	758—759	
„ IV.—The Statutes of Limitation in relation to Mortgages and other Securities	760—800	
SUB.-SECT. (1).—HOW FAR STATUTES LIMIT THE CREDITOR'S RIGHT TO RECOVER PRINCIPAL AND ARREARS OF INTEREST UNDER EXPRESS COVENANT TO PAY	760—777	
„ (2).—HOW FAR STATUTES LIMIT THE CREDITOR'S RIGHT TO EJECT THE DEBTOR OR TO BRING ACTION OF FORECLOSURE	778—800	
„ V.—Of the Onus cast on the Creditor of Proving the Security	801—804	

SECTION I.

Of the Persons entitled to Sue for the Mortgage Debt.

<i>Money secured devolves on personal representatives of the creditor</i>	707
<i>Under old law, freehold and copyhold security devolved on heir or devisee of creditor</i>	708
<i>Since 1881 freehold securities devolve on personal representative and not on heir</i>	709
<i>After foreclosure or release of equity of redemption, freehold devolves as real estate</i>	710
<i>How mortgaged estate devolves when equity of redemption barred by Statute of Limitations</i>	711

707. It has long been the law (though the original rule was different), that in all mortgages the money must go to the next of secured The money

Paragraphs
707—710

belongs to the personal representatives of the creditor.

kin, and not to the heir of the mortgagee, unless the latter in his lifetime, or by his will, do otherwise dispose thereof. And this doctrine rests on the ground that the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money. As soon as the mortgagor pays the money, the land belongs to him, and the money only to the mortgagee (*a*). And the entry by the mortgagee does not make the mortgage part of his real estate (*b*).

Under old law security devolved as real estate, but heir was mere trustee for personal representatives.

708. Before 1882, however, the legal estate in the mortgaged land vested in the devisee or heir of the mortgagee according as he died testate or intestate, and thus the security was frequently divorced from the debt. In such cases, however, the heir of the mortgagee was (before foreclosure, or release of the equity of redemption) only a trustee for the mortgagee's executors (*c*); and, if the mortgagor himself were the heir of the mortgagee, the legal estate would not pass to the devisee of the mortgagor, under a general devise of real estates in trust for sale (*d*); for to hold the contrary would be to assume that the mortgagor had authorized his devisee to make a sale, which would be a direct breach of trust. On the other hand, a specific devise of the mortgaged land by the mortgagee gives the mortgage debt to the devisee (*e*).

Since 1881 mortgaged freeholds devolve on mortgagor's personal representative and not on heir.

709. By virtue of the 30th section of the Conveyancing and Law of Property Act, 1881, the mortgaged property (where of freehold tenure) now always vests along with the debt in the legal personal representative of the mortgagee as if it were a chattel real (1989). But this is not the case with regard to the legal estate in copyholds, which still descends to the customary heir (*f*), who, of course, only holds it as trustee for the legal personal representative (1991).

After foreclosure or release of

710. After a release of the equity of redemption, or absolute foreclosure, the estate (being no longer a mere security) will pass to

(*a*) *Cotton v. Iles*, 1 Vern. 271; *Noys v. Mordaunt*, 2 Vern. 581; *Thornborough v. Baker*, 1 Ch. Ca. 283; *Meeker v. Tanton*, 2 Ch. Ca. 29; *Winne v. Littleton*, 1 Vern. 3; *Tabor v. Grover*, 2 Vern. 367; *Canning v. Hicks*, 1 Vern. 412.

(*b*) *Noy v. Ellis*, 2 Ch. Ca. 220.

(*c*) *Re Loveridge*, *Drayton v. Loveridge*, [1902] 2 Ch. 859. It would seem that at one period the heir was allowed to foreclose without joining the personal representative as between himself and the mortgagor; but as between himself and the personal representative he was a mere trustee. See *Carlisle (Earl of) v. Goble*, *Freem. Ch. Reps.* 148; differently cited 2 Vern. 67; but *cf. Clerkson v. Bowyer*, 2 Vern. 66.

(*d*) *Exp. Marshall*, 9 Sim. 555.

(*e*) *Re Carter, Dodds v. Pearson*, [1900] 1 Ch. 801.

(*f*) Copyhold Act, 1894, s. 88.

the heir or devisee (*g*). And even though the foreclosure be incomplete, if the estate be devised as realty, it will be so as between the devisor and the devisee (*h*). And upon an enlargement of time for redemption, the latter would seem to be entitled to the money; for it is plain, that whether the gift have the quality of money or land, the devisee may equally have been the object of the mortgagee's bounty. But, as against creditors, an incomplete foreclosure did not prevent the security from remaining personal assets for payment of the mortgagee's debts (*i*). Nor does it seem proper, that if the estate have descended after the order absolute for foreclosure has been obtained by the mortgagee, and the foreclosure be afterwards opened on the ground of fraud, collusion, or irregularity of process, the heir should be entitled to the redemption money, because under such circumstances he could hardly have any equity against the mortgagee's personalty. But if the foreclosure be opened for a reason which does not touch the honesty or regularity of the transaction, the heir would no doubt be entitled to the money: and even in cases of fraud, if he lost the estate, he would be entitled to the value of improvements.

Paragraphs
710—711

equity of
redemption
estate
devolves as
realty.

711. The estate will not be treated as realty in favour of the mortgagee's heir or devisees on the ground that an absolute title has been acquired by possession, under the Statute of Limitations, if, at the date of the death of the mortgagee, there was clearly only a mortgage title (*k*). But on any devolution subsequent to the date when the statute has barred the mortgagor, the estate will go as real estate (*l*).

How estate
devolves
when
mortgagee's
title is
absolute
under
Statute of
Limitations.

(*g*) *Thompson v. Grant*, 4 Mad. 438; except in cases of trust estates descending after December 31st, 1881 (Conveyancing Act, 1881, s. 30).

(*h*) *Garrett v. Evers*, Mos. 364.

(*i*) *Ibid.*

(*k*) *Flack v. Longmate*, 8 Beav. 420; *Re Loveridge*, *Drayton v. Loveridge*, [1902] 2 Ch. 859.

(*l*) *Re Loveridge*, *Pearce v. Marsh*, [1904] 1 Ch. 518.

SECTION II.

Of the time at which the Creditor may first Sue.

	PARAGRAPH
<i>Right to enforce security may be postponed by agreement</i>	712
<i>How far default in payment of interest accelerates right to enforce security</i>	713
<i>Where right to enforce is postponed, the mortgagee cannot redeem a prior mortgagee compulsorily</i>	714
<i>Postponement does not affect right to protect a threatened security</i>	715
<i>Mortgagee may exercise all his remedies concurrently when money is due</i>	716
<i>All remedies may now be had in one action</i>	717
<i>A prior encumbrancer may sue after a subsequent encumbrancer has obtained a decree</i>	718
<i>Mortgagee may, at his option, sue for possession only</i>	719
<i>Mortgagee of an agreement may sue for specific performance of it</i>	720
<i>Mortgagee may commence creditor's administration suit, or prove in existing one</i>	721
<i>Mortgagee cannot claim benefit of creditor's deed unless he elects within a reasonable time</i>	722
<i>Mortgagee of a tenant in common may sue co-tenants for an account</i> ..	723
<i>Mortgagee may interplead where rival claimants to equity of redemption</i> ..	724
<i>Mortgagee who lends to trustees does not become a cestui que trust</i>	725
<i>Both parties may sue in forma pauperis</i>	726

Right to
enforce
security may
be postponed
by agree-
ment.

712. There will be no foreclosure until default in payment, according to the agreement (*m*); but, as the right of redemption may be postponed during a certain period (**1394**), so the mortgagee's right to call in the money, and consequently to foreclose or sell may also be limited (*n*); and the limitation may be greater than that upon the right to redeem; for the same reason does not exist for guarding the rights of the mortgagee as of the mortgagor. There is, therefore, no objection to an agreement that the debt shall not be called in during the lifetime of any particular person; and unless fraud were proved, it is probable that no objection would be made to any postponement of the right. But where the postponement is conditional on punctual payment of interest the word "punctual" is construed strictly (*o*).

How far
default in
payment
of interest
accelerates
right to
enforce
security.

713. If there be an absolute covenant not to call in the money during a certain period, no default in payment of interest during that period will enable the mortgagee to sue, notwithstanding the breach of the condition in the mortgage; though if there be no such covenant, the mortgagee can sue at any time after default of payment of interest, however distant may be the day at which payment of the principal money is reserved (*p*), unless he have after-

(*m*) *Bonham v. Newcomb*, 1 Vern. 232.

(*n*) *Burrowes v. Molloy*, 2 Jo. & Lat. 521; see *Ramsbottom v. Wallis*, 5 L. J. (N.S.) Ch. 92; *Williams v. Morgan*, [1906] 1 Ch. 804.

(*o*) *Leeds and Hanley Theatre of Varieties v. Broadbent*, [1898] 1 Ch. 343.

(*p*) *Burrowes v. Molloy*, 2 Jo. & Lat. 521; *Stanhope v. Manners*, 2 Ed. 197.

wards waived his right to sue (*q*); which he does not do by the mere subsequent acceptance of interest (*r*). Paragraphs
713—716

Such a covenant also affects the right to sue in respect of any moneys, to which the mortgagee becomes entitled in that character; and even of salvage claims (as for advances of head rent) during the period included in the covenant (*s*), but not in respect of injuries to the securities (*t*).

714. It has been held that a *puisse* mortgagee, who has covenanted not to foreclose during a certain time, cannot proceed to redeem the first mortgagee, and to get a conveyance of the legal estate (*u*); for he has no right to sue the mortgagor, or to bring him before the court, because of the covenant; and without the mortgagor the first mortgagee cannot be sued (1654). Where right to enforce is postponed the mortgagee cannot redeem compulsorily a prior mortgagee.

715. But, although a mortgagee cannot enforce his security before the debt becomes payable, he may commence proceedings for protecting it. Thus a debenture holder may sue for a receiver and manager before the debentures fall due if the company's assets are endangered, *ex.gr.*, by threatened executions by ordinary creditors (*x*). And on the same principle the Admiralty Division will order the arrest of a mortgaged ship before the debt falls due if the mortgagor be using her for a purpose likely to injure the security (*y*). Postponement does not affect right to protect a threatened security.

716. After the mortgage has become forfeited (*z*) by default in payment of the principal or interest (*a*) (where any time has been fixed for payment), and at any time after the lending of the money (where no time has been fixed), the person entitled to the mortgage debt may demand payment (*b*), and, in default of payment, may proceed to exercise the special and other remedies to which, according to the nature of his security, he may be entitled Mortgagee may exercise all his remedies concurrently when money is due.

(*q*) *Langridge v. Payne*, 2 Johns. & H. 423.

(*r*) *Re Taafe*, 14 Ir. Ch. R. 347; *Keene v. Biscoe*, 8 Ch. D. 201.

(*s*) *Burrowes v. Molloy*, *supra*.

(*t*) *Dugdale v. Robertson*, 3 Jur. (N.S.) 687.

(*u*) *Ramsbottom v. Wallis*, 5 L. J. (N.S.) Ch. 92, *sed quare*.

(*x*) *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574; *Wildy v. Mid-Hants Rail. Co.*, 16 W. R. 409; *Makins v. Percy Ibotson & Sons*, [1891] 1 Ch. 133; *Thorn v. Nine Reefs, Ltd.*, 67 L. T. 93; and *Re Carshalton Park Estate, Ltd.*, *Graham v. The Co.*, [1908] 2 Ch. 62.

(*y*) *The Blanche*, 58 L. T. 592.

(*z*) *Bonham v. Newcomb*, 1 Vern. 232. It was allowed to be shown by parol evidence, that an omission to pay did not amount to default within the meaning of the deed, the consent of the person entitled to payment to enlarge the time, though made without consideration, being held to show that there was no default. (*Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123.) But in *Williams v. Stern* (5 Q. B. D. 409), the Court of Appeal held that a consent so given was no evidence of waiver of the mortgagee's right to take possession at any time.

(*a*) *Gladwyn v. Hitchman*, 2 Vern. 135; *Burrowes v. Molloy*, 2 Jo. & Lat. 521; *Edwards v. Martin*, 25 L. J. Ch. 284; and see *Roddy v. Williams*, 3 Jo. & Lat. 1; *Wilkes v. Saunior*, 7 Ch. D. 188.

(*b*) Ca. & Op. 51; Jarm. & Byth. Conv. ed. 3, vol. 6, p. 575, n.; Glanv. bk. 10, c. 8.

Paragraphs
716—717

against the debtor, or his assets, and the incumbered estate. And, contrary to the general rule, that a person liable to be sued is not to be harassed by a multiplicity of suits, it was the right of the mortgagee, or other secured creditor, so long as any part of his debt remained unpaid (*c*), to enforce at the same time, and in different courts, all his legal and equitable remedies. But nevertheless after obtaining a judgment nisi for foreclosure he cannot sell without the leave of the Court before the judgment is made absolute (*d*).

All remedies
may now be
had in one
action.

717. He may now in the same action, have personal judgment for the debt, and judgment for foreclosure (*e*), and may, at the same time, but subject to Order XVIII. Rule (2), 1883, sue for possession of the land (*f*), or enter upon it (*g*). In like manner the pawnee may hold the pawn without sale, while suing the pawnor (*h*); and as execution against the person of the debtor was not, except under the judgment acts, a satisfaction of the claim against the estate, so the possession of the latter was not a ground for discharging the execution against the person (*i*). A derivative mortgagee may, (even at the same time), bring two different suits for redemption or foreclosure, with which the court will not interfere, though they be carried on by the same solicitor, except by making the plaintiff pay costs for the vexation (*k*). And if it be not done to accumulate expense, the mortgagee may sue for foreclosure after a decree for redemption (*l*). Though it seems that if an account have been directed by consent in the redemption suit, and the plaintiff have undertaken to pay what should be found due, the mortgagee, proceeding on the undertaking, cannot avail himself of the right of

(*c*) But if he had been paid all that he claimed in an action, he could not sue in equity for a further sum unclaimed by mistake in the action. (*Darlow v. Cooper*, 34 Beav. 281.) Nor can a building society who have in error given the usual statutory receipt. (*Harvey v. Municipal Building Society*, 26 Ch. D. 273.)

(*d*) *Stevens v. Theatres, Ltd.*, [1903] 1 Ch 857.

(*e*) *Greenough v. Littler*, 15 Ch. D. 93. As to form of order see *Farrar v. Lacy Hartland & Co.*, 31 Ch. D. 42; *Lee v. Dunsford*, 54 L. J. Ch. 108; *Hunter v. Myatt*, 28 Ch. D. 181. The order for payment should be for payment one month after the chief clerk's certificate; unless the plaintiff asks by his pleadings for immediate payment, and proves the amount due for principal and interest at the trial, *Farrar v. Lacy, Hartland & Co.*, *supra*. Where such an order is made it is improper to commence a fresh action for payment in the Q. B. D. *Earl Poulett v. Viscount Hill*, [1893] 1 Ch. 277; *Williams v. Hunt*, [1905] 1 K. B. 512. But the mere appointment by the mortgagee of a receiver does not prevent him suing for the debt. *Lynde v. Waithman*, [1895] 2 Q. B. 180. As to form of order when goodwill is included in the mortgage, see *Smith v. Pearman*, 58 L. T. 720.

(*f*) *Jenkins v. Ridgley*, 68 L. T. 671; and see *Sutcliffe v. Wood*, 53 L. J. Ch. 970; *Withall v. Nixon*, 28 Ch. D. 413.

(*g*) *Burnell v. Martin*, Dougl. 417; *Barker v. Smark*, 3 Beav. 64; *Cockell v. Bacon*, 16 Beav. 158; *Lockhart v. Hardy*, 9 Beav. 349; *Rees v. Parkinson*, 2 Anst. 497.

(*h*) Story, Bailm. § 315.

(*i*) *Davis v. Battine*, 2 Russ. & Myl. 76; *Colby v. Gibson*, 3 Smith, 516.

(*k*) Per Lord HARDWICKE, *Gage v. Lord Stafford and Furness*, 1 Ves. Sen. 545.

(*l*) *Shepherd v. Titley*, 2 Atk. 348.

foreclosure, which, according to the ordinary practice, follows default in payment (*m*). Paragraphs
717—721

718. A prior incumbrancer may also bring an action after a decree has been obtained in another suit by the owner of a *puisne* charge; for he is not bound to come in under that decree, at the risk of losing his rights by the suspension of the proceedings in the suit (*n*). A prior incumbrancer may sue after a *puisne* incumbrance has obtained a decree.

719. The mortgagee's right to enforce his securities is not confined to the institution of a suit which will put an end to the mortgage. He may also at any time, until the arrival of the day of payment fixed in a redemption suit, bring his action to compel a conveyance to himself of the legal estate, or otherwise for the perfecting of his security. And this may be done even after an actual tender to him of the amount alleged to be due, if the proper notice of payment have not been given; and even after notice, if the sum tendered be considered insufficient, though at the peril of costs if it turn out that a proper amount was tendered (*o*). Mortgagee may sue for possession only.

And in such a suit, the court will not enter into the question of the amount due upon the security, unless, it seems, there be such a complete offer by the defendants to pay all that shall be found due, if the whole of the mortgagee's claim be established, as will enable the court to decree a foreclosure in case of non-payment in pursuance of the offer.

720. And for the purpose of enforcing his security upon the interest of his mortgagor in an agreement, he may sue for specific performance of the agreement (*p*). Mortgagee of an agreement may sue for specific performance of it.

721. The mortgagee, whether his security be legal (*q*) or equitable, may also proceed generally against the assets of the deceased mortgagor (**1564**), in which case he may (*r*) sue on behalf of himself and all other creditors of the mortgagor. He may also come in and prove in an administration suit for his debt, less the value which he sets upon his security, or may apply for a sale with liberty to prove for the deficiency (*s*). A mortgagee has even been allowed to prove as a creditor, in a suit to administer the Mortgagee may commence creditor's administration suit, or prove in existing one.

(*m*) *Dunstan v. Patterson*, 2 Ph. 341.

(*n*) *Arnold v. Bainbrigge*, 2 De G. F. & J. 92.

(*o*) *Grugeon v. Gerrard*, 4 Y. & C. 119; *Malone v. Geraghty*, 3 Dru. & War. 229; see also *Sporle v. Whayman*, 24 L. J. Ch. 789.

(*p*) *Browne v. London Necropolis, etc.*, Co. 6 W. R. 188.

(*q*) *Groves v. Lane*, 16 Jur. 854.

(*r*) *King v. Smith*, 2 Hare, 239; *Skey v. Bennett*, 2 Y. & Coll. C. C. 405; *Brocklehurst v. Jessop*, 7 Sim. 438; *Parsons v. Westbroke*, 5 Beav. 188; and see Rules (1883) Ord. XVI., Rule 9.

(*s*) Judicature Act, 1875, s. 10. But if after the mortgagee has valued his security, the property is sold at his instance, and realizes less than the valuation, he cannot prove for more than the deficiency as originally estimated. (*Re Hopkins, Williams v. Hopkins*, 18 Ch. D. 370.)

Paragraphs
721—724

mortgagor's estate, after obtaining a decree of foreclosure, and contracting to sell the property; but upon the terms of rescinding the contract and reconveying. And the proof will be limited in such a case to the amount recoverable at law on the mortgage covenant, and therefore will not include the costs of the foreclosure suit (*t*).

But where a mortgagee waited for fourteen years, during which the security, which was of a wasting nature, so deteriorated in value as to become insufficient for payment of the debt, he was not allowed to compel legatees under the will of the mortgagor to refund, though such of the general assets as were still otherwise available were made liable (*u*).

The mortgagee may also lose his remedy against the general assets, by refusing a tender of so much as has been found due to him under the administration decree; the fund in such a case being divided among the other creditors under the decree (*x*).

Mortgagee cannot claim benefit of creditor's deed unless he elects within a reasonable time.

722. A mortgagee cannot claim the benefit of a deed of trust for the creditors of the mortgagor, unless he have either executed the deed, or have shown a clear intention to come in within a reasonable time (*y*). Nor can a creditor, who is not a party to the deed, sue for the performance of the trusts, and establish a charge upon the trust estate for money which he has advanced to the trustee for the purposes of the trust (*z*).

Mortgagee of a tenant in common may sue co-tenants for an account.

723. The mortgagee of a share of a colliery has the same remedies as a mortgagor against the co-tenants of the latter, and may therefore sue them for an account: because the mortgagee has at law the absolute interest in the mortgagor's share of the land, and the co-tenant is a stranger to the right of redemption which limits the interests in equity (*a*).

Mortgagee may interplead where rival claimants to equity of redemption.

724. Where the right to the equity of redemption, or, (after payment of the debt,) to the title deeds, is in dispute, the mortgagee may interplead (*b*). But the court will not, at the instance of the mortgagee, direct inquiries to ascertain the title to the equity of redemption, where none of the persons claiming it are parties to the suit (*c*). The holder of goods who claims a lien upon them for charges in respect of the goods themselves, may also interplead where the right to them is disputed (*d*); but not if his claim of

(*t*) *Haynes v. Haynes*, 3 Jur. (N.S.) 504.

(*u*) *Ridgway v. Newstead*, 2 Giff. 492; affirmed 3 De G. F. & J. 474.

(*x*) *Hempstead v. Hempstead*, 4 Beav. 423.

(*y*) *Gould v. Robertson*, 4 De G. & Sm. 509.

(*z*) *La Touche v. Lucan*, 7 Cl. & F. 772.

(*a*) *Bentley v. Bates*, 4 Y. & C. 182.

(*b*) *Shotbolt v. Biscow*, 2 Eq. Ca. Abr. 173; *Roberts v. Bell*, 7 El. & Bl. 323; 3 Jur. (N.S.) 662; R. S. C. Ord. LVII.

(*c*) *Wetherill v. Garbutt*, 1 Sm. & G. 124.

(*d*) *Cotter v. Bank of England*, 3 Moo. & Sc. 180.

lien is only in respect of a debt due from one of the contending parties (e). Paragraphs 724—726

725. A mortgagee, who makes advances to trustees under a trust to raise money by mortgage or sale, is not an object of the trust, except so far as the trustees were thereby enabled to make him a good security. He has all the remedies of a mortgagee, but nothing more; and even if the trustees have power to sell after raising money by mortgage, the mortgagee cannot call upon them to exercise their power (f). Mortgagee who lends to trustees does not become a *cestui que trust*.

726. A mortgagee or other incumbrancer may sue *in forma pauperis* (g); as may also the mortgagor—who will not be liable to be dispaupered on the ground that he has received rent from the tenants of the mortgaged estate, if it were received after notice from the mortgagee not to interfere with the property, the receipt being wrongful and an aggression on the property of another (h). Both parties may sue *in forma pauperis*.

SECTION III.

When the Mortgagee will be Restrained from Suing.

SUB-SECTION (1).—*Under the inherent jurisdiction as modified by Statute.*

	PARAGRAPH
<i>Mortgagee restrained where action would be inequitable</i>	727
<i>Mortgagee cannot sue when he has put it out of his power to re-convey</i> ..	728
<i>Restrained where he allows purchaser of equity of redemption to receive purchase-money</i>	729
<i>Sub-mortgagee cannot restrain original mortgagee from suing mortgagor</i> ..	730
<i>Incumbrancer not bound to pursue his easiest and cheapest remedy</i> ..	731
<i>A conditional contract not to enforce security for certain time on certain conditions will be unavailing if conditions broken</i>	732
<i>Ultra vires advances and mortgagees</i>	733
<i>Mortgagee cannot affect prior rights to which he took subject</i>	734
<i>Nor subsequent rights which he has acknowledged</i>	735
<i>Will not be allowed to unnecessarily injure the property</i>	736
<i>Public trustee who is also mortgagee</i>	737
<i>Mortgagee of public undertaking cannot foreclose</i>	738
<i>Schemes of arrangement under Railway Companies Act, 1867</i>	739
<i>Mortgagee may be restrained for improper refusal to account or for laches</i>	740
<i>Mortgagee of advowson bringing quare impedit</i>	741
<i>First mortgagee restrained pending a redemption suit from parting with security</i>	742
<i>Mortgagor cannot rely on a contract not to realize which he himself is impeaching</i>	743
<i>Mortgagee not restrained because he is pursuing several remedies concurrently</i>	744
<i>Solicitor cannot enforce charge for costs pending taxation</i>	745

(e) *Braddick v. Smith*, 2 Moo. & Sc. 131.

(f) *Palk v. Clinton*, 12 Ves. 48; and see *Page v. Cooper*, 16 Beav. 396.

(g) *Anon.*, 2 Mol. 338.

(h) *Perry v. Walker*, 1 Y. & Coll. C. C. 672.

Paragraph
727SUB-SECTION (1).—*Under the inherent jurisdiction as modified by Statute (continued)*—

	PARAGRAPH
<i>Mortgagee's action for payment, performance of covenants, or ejectment, restrained on payment of money into court under 7 Geo. 2, c. 20</i>	746
<i>Action for foreclosure restrained on payment into court under 7 Geo. 2, c. 20</i>	747
<i>Only applicable where mortgagee not in possession, and no exercise of power of sale attempted</i>	748
<i>Inherent powers of courts of equity to stay on payment into court</i>	749
<i>Court will stay unless it would affect other interests</i>	750
<i>Inherent powers to stay exercised on condition of payment at future date, and in default foreclosure</i>	751
<i>Stay of vexatious action or actions against public officials abroad</i>	752

SUB-SECTION (2).—*Staying Proceedings under the Bankruptcy Act.*

<i>Powers of the Bankruptcy Act</i>	753
<i>Instances of how powers of the Act are exercised</i>	754

SUB-SECTION (3).—*Staying Proceedings under the Companies Acts.*

<i>Powers of the Act</i>	755
<i>Circumstances under which the powers will be exercised</i>	756
<i>Power of court to force debenture holders to exchange debentures for fully paid up shares</i>	757

SUB-SECTION (4).—*Staying Proceedings under the Judgment Acts.*

<i>The Acts do not prevent the creditor from obtaining a stop order or otherwise protecting his security</i>	758
<i>Effect of Judicature Act</i>	759

SUB-SECTION (1).—*Restraint of Proceedings under inherent jurisdiction as modified by Statute.*Mortgagee
restrained
where action
would be
inequitable.

727. In certain cases, incumbrancers will not only be restrained from exercising all, or more than one, of their remedies, but even from exercising them singly. Thus the mortgagee's action of ejectment has been stayed (on security being given to redeem) on the ground of entangled accounts, where a suit for an account was also pending against the mortgagee, and it was considered beneficial to all parties to keep the possession in suspense in the meantime (*i*). And where the vendor of an estate had taken a bond for the unpaid purchase-money, he was ordered to elect whether he would sue on the bond or enforce his lien (*k*). Also, the mortgagor having a right to protection against a double account of what is due on the same mortgage, a mortgagee has been restrained from proceeding in a foreclosure suit in a Colonial court, begun after a decree directing inquiries and accounts in an English suit for redemption—all the parties being in England, and

(*i*) *Booth v. Booth*, 2 Atk. 343.(*k*) *Barker v. Smark*, 3 Beav. 64.

the facilities for taking the accounts there being greater ; but the plaintiff in the English suit was put upon terms to submit to such orders in the Colonial court as the English Chancery should think reasonable (*l*). And so the owner of an estate subject to a charge, upon paying the amount of it with interest into court in a suit to raise the charge, has been protected by injunction from proceedings by the mortgagee of the charge to obtain possession of the land (*m*).

Paragraphs
727—730

And if a mortgagee apply for leave to sign judgment on an affidavit of no defence, and an account is claimed by the defendant, the judgment will at the most only be given as an additional security for the amount found due on taking the account, and on the terms of consenting to an immediate account, and of no execution being issued without the leave of the court (*n*).

728. The mortgagee has also been restrained from proceeding on his collateral security, where, the title deeds being out of his power, he was unable effectually to re-convey the estate ; the amount due being directed to be ascertained and paid into the bank, there to remain until the title deeds could be secured, and a re-conveyance had (*o*). So a mortgagor who has foreclosed one mortgage, and afterwards sold the property comprised in it (though he sold it fairly) for less than was due, will not be allowed to proceed on his collateral securities, the sale having put it out of his power to re-open the foreclosure (*p*) ; and the same result follows where a mortgagee having transferred the mortgage without the collateral securities, afterwards proceeds to sue the mortgagor on the latter (*p*).

Mortgagee cannot sue where he has put it out of his power to re-convey.

729. So if he join with the *purchaser* of the equity of redemption in a sale, and allow him to receive the purchase-moneys, the mortgagee (being no longer able to re-convey the estate) will not be allowed to sue the mortgagor for the amount so allowed to be received (*q*).

Restrained where he allows purchaser of equity of redemption to receive purchase-money.

730. A sub-mortgagee cannot prevent the original mortgagee from suing his mortgagor, and yet hold him liable for the debt secured by the sub-mortgage. He can, therefore, only restrain the action on the terms of releasing the original mortgagee from his personal liability on the sub-mortgage, and restoring to him any other security which may have been given ; but he is entitled to have the money to be recovered in the action secured (*r*).

Sub-mortgagee cannot restrain original mortgagee from suing mortgagor.

(*l*) *Beckford v. Kemble*, 1 Sim. & St. 7.

(*m*) *Duncombe v. Greenacre*, 28 Beav. 472.

(*n*) *Wallingford v. Mutual Society*, 5 App. Cas. 685, 695.

(*o*) *Schoole v. Sall*, 1 Sch. & Lef. 176.

(*p*) *Lockhart v. Hardy*, 9 Beav. 349 ; *Walker v. Jones*, L. R. 1 P. C. 50.

(*q*) *Palmer v. Hendrie*, 27 Beav. 349. As to the mode of pleading this defence at law, see *Rudge v. Richens*, L. R. 8 C. P. 358 ; but query the effect of the judgment.

(*r*) *Gurney v. Seppings*, 2 Ph. 40.

Paragraphs
731—733

Incumbrancer not generally bound to pursue his easiest and cheapest remedy.

731. An annuitant having a specific remedy by entry and distress, either expressly or by statute (*s*), was not allowed, where the rent of the property was sufficient to answer the claim, to pursue the more burdensome remedy of a suit in equity (*t*); although where the annuity has fallen into arrear, the court has a discretion to raise the arrears by sale or mortgage (*u*). But an incumbrancer is not generally prevented from using such remedies as are open to him, on the ground that he has an easier mode of relief (*x*), or on the ground of interference with the rights of other persons claiming under the same security (though this may be a reason for staying execution) (*y*), unless the pursuit of the remedy in question would be contrary to the spirit and intention of the contract, and in breach of good faith. Such would be an action on an implied contract to recover a debt secured by a warrant of attorney, upon which the proper remedy is to enter up judgment (*z*); and an action by a mortgagee on his security, after proving for his whole debt, when, according to the construction of the deed of inspectorship, the property was to be divided as in bankruptcy (*a*).

A conditional contract not to enforce security for certain time on certain conditions will be unavailing if conditions broken.

732. Where a collateral agreement has been entered into that the security shall not be enforced if the debtor observes certain conditions, the creditor will not be prevented from enforcing the security if the debtor has failed to observe such conditions (*b*). Thus, a mortgagee was not restrained from exercising his remedy under a mortgage, on the ground of an agreement that it should contain a clause postponing the mortgagee's right to call in the money, where a corresponding condition for punctual payment of interest had not been observed by him (*c*).

Ultra vires advances and mortgages.

733. A mortgagee who has not exceeded his powers in lending on the security, may do any prudent and proper act for the purpose of getting the benefit of the security, though such act would otherwise be *ultra vires* (*d*). But an incumbrancer will be restrained from exercising a power of sale in a security which was originally *ultra vires*, or made in the irregular or improper exercise of a

(*s*) See 4 Geo. 2, c. 28; Conveyancing and Law of Property Act, 1881, c. 41, s. 44.

(*t*) *Buxton v. Monkhouse*, G. Coop. 41; *Sollory v. Leaver*, L. R. 9 Eq. 22; *Kelsey v. Kelsey*, L. R. 17 Eq. 495.

(*u*) *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323. *Hambro v. Hambro*, [1894] 2 Ch. 564. (x) *Duncan v. Manchester Waterworks*, 8 Pr. 697.

(*y*) *Bolckow v. Herne Bay Pier Co.*, 1 El. & Bl. 75.

(*z*) *Sherborne v. Tollemache*, 13 C. B. (N.S.) 742.

(*a*) *Kingsford v. Swinford*, 4 Drew. 705.

(*b*) *Parry v. Great Ship Co.*, 4 B. & S. 556; *Winthrop v. Murray*, 8 Hare, 214.

(*c*) *Seaton v. Simpson*, W. N. (1870) 261.

(*d*) *Royal Bank of India's case, Re Asiatic Banking Corporation*, L. R. 4 Ch. 252, explained in *Sheffield and South Yorkshire Permanent Building Society v. Aizlewood*, 44 Ch. D. 412.

power (e). On application by a mortgagor to stay a sale he must bring the money into court (f). Paragraphs
733—738

734. The mortgagee will also be restrained from doing acts in disregard of the rights of persons, subject to whose contracts with the mortgagor he has taken his security; and therefore from so dealing with a ship, as to prevent the performance of a charter-party of which he had notice (g). But if the mortgagor cannot put the ship into a condition to perform the contract, and the charterer have neglected to take steps to compel its performance, the mortgagee will no longer be prevented from exercising his rights. Mortgagee cannot affect prior rights to which he took subject.

735. He will be controlled in the exercise of his remedies as mortgagee, if, by a subsequent contract with the mortgagor, their respective relations have been changed (h). He will be compelled to respect rights which have been acquired by third persons from the mortgagor since the date of the security, if he have done acts which amount to an acknowledgment of such rights, or if the security were taken with the knowledge that the granting of such rights was incident to the purposes to which the estate was devoted (i). Nor subsequent rights which he has acknowledged.

736. And he will not be allowed to cause unnecessary injury to the estate, as by cutting timber, when the security is not shown to be defective (k) (675). Will not be allowed to unnecessarily injure the property.

737. The trustee of property belonging to a public body, being a mortgagee of the same property under an instrument made in pursuance and for the purposes of the trust, will not be restrained from exercising his rights as mortgagee, and in so doing from using the property in a manner opposed to the trusts under which he acts (l), where the general public are not interested under a statute in the performance of such trusts. Public trustee who is also mortgagee.

738. Where the security consists of a railway, canal, water-works, or other work in the maintenance of which the general public are interested (174), under the statute which authorized its construction, the mortgagee or judgment creditor is not allowed to Mortgagee of public undertaking cannot foreclose.

(e) *Southampton Boat Company v. Pinnock*, 9 L. T. (N.S.) 748; 12 W. R. 330; *Southampton Boat Co. v. Muntz*, 9 L. T. (N.S.) 748; 12 W. R. 330; *Southampton Boat Co. v. Rawlins*, 9 L. T. (N.S.) 749; 12 W. R. 331.

(f) *Hickson v. Darlow*, 23 Ch. D. 690. If the mortgagee was the mortgagor's solicitor the court will regulate the terms on which the money is to be paid in. *Macleod v. Jones*, 24 Ch. D. 289.

(g) *De Mattos v. Gibson*, 4 De G. & J. 276.

(h) *Drummond v. Pigou*, 2 Myl. & K. 168. As to whether the modifying contract must be by deed where the mortgage was itself a deed, see *Feehan v. Mandeville*, 28 Ir. L. R. 90, where the difficulty was avoided by presuming that an indorsed memorandum was executed before or as part of the deed.

(i) *Mold v. Wheatcroft*, 27 Beav. 510; *Moreland v. Richardson*, 24 Beav. 33; see *Powell v. Aiken*, 4 K. & J. 343.

(k) *Withrington v. Banks*, Sel. Ca. in Ch. 30.

(l) *Att.-Gen. v. Hardy*, 1 Sim. (N.S.) 338.

Paragraphs
738—739

foreclose or to sell the undertaking, or the land or works, or to take possession under an *elegit*, or otherwise than by means of a receiver (840—841); nor to use any other remedy against the land than that which is expressly prescribed by the statute under which his security is created, or which will interfere with the public right to the continued use of the undertaking, or with the powers which the company alone are authorized to exercise (*m*). And by statute (*n*), the rolling stock or plant used or provided by a railway company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be taken in execution on a judgment recovered in an action on a contract entered into after the passing of the Act, or in an action not on a contract, commenced after its passing; but the judgment creditor may obtain a receiver, and, if necessary, a manager, on petition to the Chancery Division; and the receiver, after providing for the working expenses and other outgoings, is to apply the receipts in payment of the debts of the company according to the rights and priorities of the creditors.

The protection given by the Act to rolling stock and plant continues after a railway which has been open, is closed for public traffic (*o*).

Schemes of
arrangement
under
Railway
Companies
Act, 1867.

739. After the filing of a scheme of arrangement under the Railway Companies Act, 1867 (*p*), the court may, on the summary application of the company on motion or petition, restrain any action against the company on such terms as the court thinks fit.

(*m*) *Furness v. Caterham Rail. Co.*, 25 Beav. 615; *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 142; *Eyton v. Denbigh, etc., Rail. Co.*, L. R. 6 Eq. 488; see *Gardner v. London Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201; *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. 104; *Wickham v. New Brunswick, etc., Rail. Co.*, L. R. 1 P. C. 64; *Doe d. Myatt v. St. Helen's, etc., Rail. Co.*, 2 Q. B. 374; *Re Exmouth Docks Co.*, L. R. 17 Eq. 181; *Re Herne Bay Waterworks Co.*, 10 Ch. D. 42; *Blaker v. Herts and Essex Waterworks Co.*, 41 Ch. D. 399; *Marshall v. South Staffordshire Tramways*, [1895] 2 Ch. 36; *Pegge v. Neath District Tramways Co.*, [1895] 2 Ch. 508, 511. These cases are inconsistent with, and overrule *Re Portsmouth Tramways Co.*, [1892] 2 Ch. 362; and *Bartlett v. West Metropolitan Tramways*, [1893] 3 Ch. 437; [1894] 2 Ch. 286.

(*n*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), ss. 1, 4; continued by several Acts, and made perpetual by 38 & 39 Vict. c. 31. Before these Acts execution might be issued against the rolling stock and other chattels of the company; but if the judgment were founded on a mortgage debenture, the holder of which was entitled only to be paid *pari passu* with the holders of other debentures issued by the company, he was treated in respect of his execution as a trustee for the other debenture creditors; and where a receiver had already been appointed in the suit, an inquiry was directed whether it would be for the benefit of the other debenture creditors that the receiver should take proceedings to render the judgment available for their benefit. (*Bowen v. Brecon Rail. Co.*, L. R. 3 Eq. 541; but see *Re Potteries, etc., Rail. Co.*, L. R. 5 Ch. 67.) But it was held that if he had recovered the debt, and had been allowed to appropriate it, he could not afterwards be considered to have received it as a trustee. (*Fountaine v. Carmarthen Rail. Co.*, L. R. 5 Eq. 316.)

(*o*) *Midland Wagon Co. v. Potteries, etc., Rail. Co.* 6 Q. B. D. 36. As to the effect of the Act upon an agreement for the sale and re-hire of rolling stock, see *Yorkshire Railway Wagon Co. v. Maclure*, 21 Ch. D. 309.

(*p*) 30 & 31 Vict. c. 127, ss. 7—11, 14—18.

After publication of notice of the filing of the scheme in the Gazette, no execution, attachment or other process against the property of a railway company will be available without leave of the court, to be obtained on summons or motion. The assent in writing to such scheme by three-fourths in value of the holders of the mortgages or bonds issued under the authority of the company's special Acts, and by three-fourths in value of the holders of debenture stock of the company, will be deemed to be the assent of all the holders of such mortgages, bonds and debenture stock respectively. And a like proportion in value of the holders of rent-charges or payments charged on receipts of or payable by the company in consideration of the purchase of the undertaking of another company, and of mortgages, bonds and debenture stock of a leasing company will, so far as relates to such creditors, bind that company; but the assent of such creditors will be unnecessary where their interests will not be prejudicially affected by the scheme. A debenture holder, who is also a judgment creditor, will be bound in respect of his judgment and restrained from issuing execution when the scheme has been assented to by the statutory majority of debenture holders (*q*); but unpaid landowners and outside creditors are not bound by the scheme, save that proceedings by them may be restrained during the maturing of the scheme (*r*).

The scheme, when confirmed under the Act, is to be enrolled in the court, and has the same effect as if enacted by Parliament, against and in favour of the company, and all parties assenting thereto or bound thereby.

740. The mortgagee may also be prevented from using his remedies if he have neglected to furnish a proper account, and have refused a proper and sufficient tender (*s*). And he may, by *laches*, lose his rights not only against a later incumbrancer without notice, whom he suffers to enter and retain possession of the estate for many years, without requiring any payment on account of his security, or any admission of title (*t*), but also against the mortgagor, even when the property is unproductive (*e.g.* an advowson) (*u*). Mortgagee may be restrained for improper refusal to account or for *laches*.

741. When an advowson is the subject of the security, the mortgagee of the mortgagor will be restrained, upon the mortgagor's offer to redeem; and the court will compel the resignation of the mortgagee's and the presentation of the mortgagor's nominee; because the mortgagee, although he be in possession, cannot legally make any profit of the right of presentation (*v*). Mortgagee of advowson bringing *quare impedit*.

(*q*) *Potteries, etc., Rail. Co. v. Minor*, L. R. 6 Ch. 621; see *London Financial Association v. Wrexham, etc., Rail Co.*, L. R. 18 Eq. 566; *Re Potteries, etc., Rail. Co.*, L. R. 5 Ch. 67.

(*r*) *Re Cambrian Rail. Co.'s Scheme*, L. R. 3 Ch. 278.

(*s*) *Herries v. Griffiths*, 2 W. R. 72. (*t*) *Searle v. Colt*, 1 Y. & Coll. C. C. 36.

(*u*) *Brooks v. Muckleston*, [1909] 2 Ch. 519.

(*v*) *Gally v. Selby*, 1 Str. 403; *Robinson v. Jago*, Bunb. 130; *Amhurst v. Dawling*,

Paragraphs
742—744

First mortgagee restrained pending a redemption suit, from parting with security:

742. Again, if the plaintiff in a redemption suit have made out a *primâ facie* title to redeem (as by showing that he is an incumbrancer on the estate) the court, without determining in what rank he stands, or who are the other persons entitled to redeem or foreclose, will, upon motion in the cause, restrain the first mortgagee from transferring or assigning the mortgage security, and from conveying or otherwise dealing with the legal estate in the hereditaments comprised in the security, until the rights of the parties can be settled, upon the principle of protecting the security pending the litigation; but it will not interfere with the possession of the deeds (x). And the court will take this course the more readily if the first mortgagee have contracted to deal with the estate by surprise, or have shown an intention to deprive the puisne mortgagee of his rights; as where the agreement for sale was made after the filing of the bill to redeem, no objection having been made to the right to redeem, till the six months' notice of payment had nearly expired. A sale by the mortgagee for an improper object will also be restrained (y) (935).

Mortgagor cannot rely on a contract not to realize which he himself is impeaching.

743. The mortgagee will not be restrained from selling, upon the application of an incumbrancer claiming to restrain him from doing so, by virtue of a contract which he is at the same time impeaching. As where the assignee of a puisne mortgagee, whose assignor was privy to a transaction by which the first mortgagee's rights were admitted, had filed a bill to impeach those rights, and attempted to stop the sale, on the ground that by the same transaction the first mortgagee had limited his power of sale (z).

Mortgagee not restrained because he is pursuing several remedies concurrently.

744. Nor will the court interfere with the mortgagee's action on his covenant, on the ground that a contract, still incomplete, has been made by him to sell the estate for a larger sum than is due on the mortgage (a); nor with his right to recover possession, because, after contracting to sell, he has brought an action on the covenant, and has compromised it on payment of a sum of money by another person whom the original mortgagee afterwards redeemed for the purpose of completing his contract for sale (b); nor prevent him from enforcing his rights against the security, where it is immovable

2 Vern. 401; *Jory v. Cox*, Pre. Ch. 71; *Mackenzie v. Robinson*, 3 Atk. 559; see *Gardiner v. Griffith*, 2 P. Wms. 403. But according to Dickens, Lord THURLOW, in such a case, directed an account of what was due on the mortgage, and payment by a short day, with injunction in the meantime; and, on the report, liberty to apply. *Dyer v. Lord Craven*, 2 Dick. 662.

(x) *Rhodes v. Buckland*, 16 Beav. 212; *James v. Biou*, 3 Swans. 234.

(y) *Whitworth v. Rhodes*, 20 L. J. Ch. 105.

(z) *Cockell v. Bacon*, 16 Beav. 158.

(a) *Willes v. Levett*, 1 De G. & Sm. 392; but the report is not very clear. The prayer was to restrain the sale as well as the action, and the common injunction was granted in that form, and was dissolved. But the Vice-Chancellor's observations appear only to refer to the action.

(b) *Davies v. Williams*, 7 Jur. 663.

property in a foreign country, in the courts of which he has commenced proceedings (c); nor interfere with his proceedings by reason of a decree made in another suit in his absence (d). Paragraphs
744—747

745. A solicitor cannot enforce a charge for costs upon his client's estate by suit pending the taxation of the costs; but it seems that if the suit be only to establish the charge, it may be ordered to stand over until the taxation is completed (e). Solicitor
cannot
enforce
charge for
costs pending
taxation.

746. It was provided by statute (f), that where any action should be brought on any bond (which included covenant (g)) for *payment of a mortgage debt, or performance of mortgage covenants*, or where any *action of ejectment* should be brought in any court of record at Westminster, or in the Court of Great Sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster or Durham, by any mortgagee or his representative or assignee, for recovery of the possession of any mortgaged hereditaments, and *no suit should be then depending in any court of equity in England for the foreclosing or redeeming of such mortgaged hereditaments*, if the person having right to redeem such mortgaged hereditaments, and who should appear and become defendant in such action, should, pending such action pay to the mortgagee (or in case of his refusal, bring into the court where such action should be depending) all the principal moneys and interest due on such mortgage, and also all costs expended in any suit or suits at law or in equity upon such mortgage (such principal, interests and costs to be computed by the court where such action should be depending or by the proper officer to be appointed for that purpose), the moneys so paid or brought into court should be taken to be in full satisfaction and discharge of such mortgage; and the court should discharge every such mortgagor or defendant from the same accordingly, and compel such mortgagee, at the costs of such mortgagor, to assign, surrender or re-convey the mortgaged hereditaments and the mortgagee's estate and interest therein, and deliver up all deeds, evidences and writings relating to the title of the mortgaged hereditaments unto the mortgagor who should have paid or brought such moneys into court, his heirs, executors or administrators, or such other person or persons as he or they should for that purpose appoint. Mortgagee's
action for
payment,
performance
of covenants,
or ejectment,
restrained on
payment of
money into
court under
7 Geo. 2, c. 20.

747. And (h), that when any suit should be brought in equity to compel the defendant or defendants, having or claiming a right Action for
foreclosure
restrained

(c) *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681.

(d) *Crowle v. Russell*, 4 C. P. D. 186.

(e) *Waugh v. Waddell*, 16 Beav. 521.

(f) 7 Geo. 2, c. 20, s. 1. The provisions of s. 1, so far as they relate to actions of ejectment by mortgagees, were re-enacted in almost similar words by the Common Law Procedure Act, 1852, s. 219.

(g) *Dixon v. Wigram*, 2 Cr. & J. 613; *Smeeton v. Collier*, 1 Ex. 457.

(h) 7 Geo. 2, c. 20, s. 2.

Paragraphs
747—749

on payment
into court
under 7 Geo.
2, c. 20.

to redeem, to pay the principal and interest due, or the principal and interest together with any moneys due on any incumbrance or specialty chargeable on the equity of redemption, and in default of payment for foreclosure, the court on an application by the defendant or defendants having a right to redeem, and on his or their admitting the title of the plaintiff, might, at any time before bringing the cause to a hearing, make such decree as it might have made in case the suit had been regularly brought to a hearing; and all parties should be bound by such decree, as if it had been made by the court at or after the hearing of the suit. But the Act did not extend to any case in which the person against whom the redemption was prayed should insist in writing, before the money was brought into court, that the party praying redemption had no right to redeem, or that the premises were chargeable with other principal sums than those appearing on the face of the mortgage, or admitted to be due; nor to any case where the right of redemption was controverted between different defendants in the same suit, nor to the prejudice of any subsequent mortgagee or incumbrancer.

Only
applicable
where
mortgagee
not in
possession
and no
exercise of
power of sale
attempted.

748. The object of the statute was to relieve the mortgagor from the delay and expense of a suit in equity for redemption, and not to lessen the rights of the mortgagee. And there being no provision for accounts or allowances where the mortgagee had been in possession, the application of the statute was limited to cases in which it would be equitable to relieve on payment only of principal, interest, and costs of suit: viz., where the mortgagee was not in possession, and had not attempted to exercise the power of sale. And where he had attempted to sell, an order for reconveyance was refused unless the mortgagor would consent to pay the costs incurred (*i*).

The statute does not affect the rights of the parties after payment; being applicable only while the security is subsisting (*k*).

Inherent
power of
courts of
equity to
stay on
payment into
court.

749. The object of the statute was merely to give a new jurisdiction in the case of mortgages, to courts of law (*l*); the second section, as to courts of equity, being merely incidental and unnecessary; because there was always in those courts an inherent jurisdiction to stay the proceedings in any cause, and in any stage of the cause, whenever the defendant submitted to a decree, establishing the full demand made by the bill, and giving the whole relief prayed in respect of that demand with costs (*m*). And it

(*i*) *Sutton v. Rawlings*, 3 Ex. 407; *Dowle v. Neale*, 10 W. R. 627.

(*k*) *Sands to Thompson*, 22 Ch. D. 614.

(*l*) *Praed v. Hull*, 1 Sim. & St. 331; *Boys v. Ford*, 4 Mad. 40; *Damer v. Earl of Portarlington*, 2 Ph. 30. See form of order there, *Paynter v. Carew*, Kay, App. xxxvi.

(*m*) And see Rules, 1883, Order XXII.

is considered, by the fusion of the legal and equitable jurisdictions under the Judicature Acts, the statute of Geo. 2 has practically become obsolete, and that it is no longer useful to consider the working of it.

Paragraphs
749—751

750. The court will stay proceedings, under its inherent powers, upon payment or tender by a *puisne* incumbrancer to the plaintiff (who is always liable to be paid off) of his principal, interest and costs, and upon bringing into court a sum sufficient to cover the costs of the defendant, so far as the plaintiff is liable to them, until the amount has been ascertained (*n*). But the court will refuse to make such an order, where it would affect the interests of the other defendants, by interfering with questions as to the priorities of the incumbrances; or with an order of the court made in another suit relating to the same securities. Though even in such a case it will anticipate the decree at the hearing by ordering inquiries as to the priorities of, and the amounts due to, the incumbrancers, and if proper, by directing a sale (*o*).

Court will stay unless it would affect other interests.

In another case in equity (*p*), a motion for reconveyance and stay of proceedings in a suit by a *puisne* incumbrancer, against the mortgagor and other mortgagees for foreclosure, was granted on payment into court by the defendant of enough to cover the principal and interest due to the plaintiff, and the costs of him and the other mortgagees, defendants to the suit, as between solicitor and client. A rule at law (*q*) for reconveyance and delivery of the deeds by a first mortgagee, who had received notice from a second mortgagee not to part with them, seems more open to question, considering the duties of a first mortgagee in such a position; but it was said that several modes might be adopted to prevent injury to the second mortgagee through the interference of the court.

751. The court can also make such an order under its inherent powers, as it might have made at the hearing (*r*), viz., for account and foreclosure, in default of payment on a given day; and has even stayed proceedings on payment, on or before a certain day, without giving the plaintiff his right of foreclosure on default of payment at that day; but with a proviso, that on such default it should be deemed that no order had been made on the application (*s*). This, however, seems hardly to meet the rights of the mortgagee, who is undoubtedly entitled to proceed upon all his remedies, without being stopped or delayed otherwise than by

Inherent power to stay exercised on condition of payment at future date, and in default foreclosure.

(*n*) See form of order in *France v. Cowper*, W. N. (1871) 76.

(*o*) *Paine v. Edwards*, 8 Jur. (N.S.) 1201.

(*p*) *Laslett v. Cliffe*, 5 Jur. 403.

(*q*) *Dixon v. Wigram*, 2 Cr. & J. 613.

(*r*) See *Aberdeen v. Chitty*, 3 Y. & C. at p. 382, where a sale was ordered.

(*s*) *Jones v. Tinney*, Kay App. xlv.; *Challie v. Gwynne*, Kay, App. xlv.

Paragraphs
751—753

payment of all that is due, or the alternative remedy. And *Wood*, V.-C., refused (*t*), where no tender or payment had been made, to make any order to stay proceedings which would give the plaintiff less than the decree of foreclosure on default of payment at the day fixed; refusing also to make a decree of absolute foreclosure on default, where there were many defendants, because a partial decree against one defendant only ought not to be made. The inference therefore seems to be, that where no payment or tender has been made, and there are several defendants entitled to redeem, and not consenting to the application, the court ought not to make an order under its own powers, on the application of one of such defendants, staying proceedings on payment at a given day, with foreclosure on default against the defendant seeking the order.

Stay of
vexatious
actions or
actions
against public
officials
abroad.

752. Under its general powers, and upon considerations of policy or convenience, the court will also stay proceedings in suits, independently of any submission to the demand made by the writ. Thus, where a plaintiff had already filed two harassing bills for redemption, which were dismissed, the proceedings in a third suit, commenced for the same purpose, were stayed (*u*) until payment of the former costs. And the court has stayed a suit for redemption, against an ambassador, for a year and a day, unless he should sooner return from his embassy (*x*); upon the principle that he is entitled, as a public officer, to be protected against suits during his absence. And to the same effect, says Lord *Coke* (*y*), that, “as to the king’s soldier, and the king’s ambassador, both these being for the publique good of the realme, private transactions and suites must be suspended for a convenient time.”

SUB-SECTION (2).—*Staying Proceedings under the Bankruptcy Law.*

Powers of the
Bankruptcy
Act.

753. The court has power, under s. 102 of the Bankruptcy Act, 1883, to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court may deem it expedient or necessary to decide, for the purpose of doing complete justice, or making a complete distribution of property in any such case. But the county court cannot, in certain cases, adjudicate upon claims not arising out of the bankruptcy.

(*t*) *Paynter v. Carew*, Kay, App. xxxvi.

(*u*) *Calvert v. Routh*, 4 Y. & C. 514. As to applications at law to stay proceedings on forfeiture of a bond by non-payment of interest, see 4 Anne, c. 16, s. 13; *Darby v. Wilkins*, 2 Str. 957; *Van Sandau v. —*, 1 B. & Ald. 214; *Wheelhouse v. Ladbroke*, 3 H. & N. 291.

(*x*) *Pilkington v. Stanhope*, 2 Vern. 317.

(*y*) Co. Litt. 130A.

And under s. 10 (2) of the Act of 1883 the court may, at any time after presentation of a bankruptcy petition, stay any action, execution, or other legal process (which includes a sequestration issued in Chancery (z)) against the person or property of the debtor; and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against him, either stay the proceedings, or allow them to continue on such terms as it may think just.

Paragraphs
753—755

754. The consideration of the circumstances under which the court will exercise these powers belongs to the practice of the bankruptcy court, and will be found treated of in works devoted to that subject; but it may be stated that the court has restrained the exercise by secured creditors of their legal rights contrary to the provisions of the bankrupt laws, or to equitable considerations (a). It has stopped an action of foreclosure by a mortgagee, commenced after the trustee had made an advantageous contract for the sale of the estate, ordering him to concur in the sale, and to give up his deed on payment into court of the full amount which he claimed (b); and has prevented the creditor from suing the trustee on an alleged bill of sale, the validity of which was disputed by the trustee (c); and has also restrained a person who had claimed under an inspectorship deed, from prosecuting an action out of the jurisdiction against the debtor in respect of matters within the scope of the deed (d). But it has refused to interfere with a suit in Chancery by a mortgagee, which involved questions not affecting the administration of the estate in bankruptcy (e); or to stay an attachment in the Lord Mayor's Court, under a garnishee order obtained by a creditor in respect of a debt due jointly from the debtor in liquidation and another person not before the court, and under which the goods attached had been found to be the property of the debtors (f); or to interfere with the rights of an execution creditor who had seized the goods before the petition for bankruptcy (g).

Instances of
how powers
of the Act
are exercised.

SUB-SECTION (3).—*Staying Proceedings under the Companies Acts.*

755. By the Companies Act, 1862, s. 85 (now represented by the Companies Consolidation Act, 1908, s. 140), the court may, at any time after the presentation of a petition and before the order

Powers of
the Acts.

(z) *Exp. Hughes, Re Browne*, L. R. 12 Eq. 137.

(a) See *Re Chidley, Re Lennard*, 1 Ch. D. 177.

(b) *Exp. Ditton, Re Woods*, 1 Ch. D. 557.

(c) *Exp. Cohen, Re Sparke*, L. R. 7 Ch. 20.

(d) *Exp. Tait, Re Tait and Co.*, L. R. 13 Eq. 311.

(e) *Exp. Rumboll, Re Taylor and Rumboll*, L. R. 6 Ch. 842.

(f) *Exp. Isaac, Re De Vecchj*, L. R. 6 Ch. 58; and see *Re England*, L. R. 12 Eq. 207. But see *Re Trehearne*, 60 L. J. Q. B. 50.

(g) *Exp. Locke, Re Hall*, L. R. 6 Ch. 795; but see *Re Tidey*, 21 L. T. (N.S.) 685.

Paragraphs
755—756

for winding-up a company, upon the application of the company, or of any creditor or contributory, restrain further proceedings in any action or proceeding against the company, upon such terms as the court thinks fit. And by s. 87 (Companies Consolidation Act, 1908, s. 142), when a winding-up order has been made under the Act, no action or proceeding shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court may impose. And by s. 138 (Companies Consolidation Act, 1908, s. 193), the court, on the application of the liquidators, or of any contributory in a voluntary winding-up, may exercise all the powers which it might exercise if the company were being wound up by the court, subject to such conditions as the court may think fit. And by s. 163 (Companies Consolidation Act, 1908, s. 211), where any company is being wound up by or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents (*h*). And by s. 201 (Companies Consolidation Acts, 1908, s. 270), the court may also, at any time after the presentation of a petition for winding-up an unregistered company, and before making a winding-up order, upon the application of any creditor of the company, restrain further proceedings in any action, suit or proceeding against any contributory of the company, or against the company as therein-before provided, upon such terms as the court thinks fit. The Court of Appeal has refused to interfere with the exercise by the judge of the court below of the discretionary power vested in him by s. 87 (*i*); although in an earlier case it was done under s. 201 (*k*).

Circum-
stances under
which the
powers will
be exercised.

756. The consideration of the circumstances under which the court will exercise its powers, belongs rather to the law relating to joint stock companies, and will be found in the works relating to that subject (*l*). But it may be stated generally that the court will not interfere with the rights of a mortgagee, by withholding from him leave under s. 87 of the Companies Act, 1862 (Companies Consolidation Act, 1908, s. 142), to proceed with an action, after a winding-up order, or by preventing him from proceeding to realize his security, without special ground, or without offering him all that he is entitled to (*m*); or upon a mere suggestion, that upon

(*h*) See *Re Lancashire Cotton Spinning Co.*, *Re Carnelley*, 35 Ch. D. 656.

(*i*) *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, L. R. 6 Ch. 643.

(*k*) *Re Great Ship Co.*, 4 De G. J. & S. 63.

(*l*) See Lindley, Companies, and Buckley, Companies, under the sections.

(*m*) *Re David Lloyd & Co.*, *Lloyd v. David Lloyd & Co.*, 6 Ch. D. 339; *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150, and *Re Henry Pound, Son & Hutchins*, 42 Ch. D. 402. For instance, a receiver appointed by debenture holders under a power will not be discharged simply because the Company has gone into liquidation: *Re Joshua Stubbs, Limited*, *Barney v. Joshua Stubbs, Limited*, [1891]

enquiry, his security may be found to be impeachable (*n*). And generally, the court is unwilling to interfere with the legal rights of mortgagees, and hardly ever does so without requiring payment into court of, or other security for the mortgage debt (*o*). The proper way of enforcing a claim against property belonging to a company which is being wound up, is to apply in the winding-up; but if there are mortgagees who are not before the court in the winding-up, leave will be given to prosecute the claim in the proper court (*p*).

Paragraphs
756—758

757. By the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104, s. 2), as extended by the Companies Acts, 1900 and 1907 (63 & 64 Vict. c. 48, s. 24, and 7 Edw. 7, c. 50, s. 38), all of which provisions are now represented by the Companies Consolidation Act, 1908, s. 120, the court is empowered to sanction schemes between the company and its creditors, or members of any class of them respectively. The power extends to debenture holders, and under it the court has jurisdiction to deprive them of their securities, and to force fully paid up shares on them in lieu thereof, if satisfied that the scheme is fair and equitable, but not otherwise (*q*).

Power of
court to
force debenture
holders
to exchange
debentures
for fully paid
up shares.

SUB-SECTION (4).—*Staying Proceedings under the Judgment Acts.*

758. The provisions which restrain the judgment creditor, who has obtained a charging order (*r*), from taking any proceedings to obtain the benefit of it till the expiration of six calendar months from the date of the order (**484**), do not prevent him from getting a stop order within that period to restrain payment of the dividends (*s*). The order only prevents the security from being diminished, by restraining the payment of a part of the fund which it was intended by the statute should be impounded for the benefit of the creditor.

The Acts do
not prevent
the creditor
obtaining
a stop order
or otherwise
protecting
his security.

1 Ch. 475; *Strong v. Carlyle Press* (No. 1), [1893] 1 Ch. 268. On the other hand, as a general rule of convenience, where a receiver is appointed by the court in a debenture holder's action, and subsequently the company is being wound up, the court will ordinarily displace the receiver and appoint the liquidator to be receiver. But this will not be done unless there be a substantial amount of calls and similar assets outstanding: *Re Joshua Stubbs, Ltd.*, *Barnry v. Joshua Stubbs, Ltd.*, *supra*.

(*n*) *Exp. Bayly, Re Hart*, 15 Ch. D. 223.

(*o*) *Per COTTON, L.J., Exp. Bayly, Re Hart*, 15 Ch. D. at p. 227; and see *Re Longdendale Cotton Spinning Co.*, *per JESSEL, M.R.*, 8 Ch. D. at p. 153; *Hill v. Kirkwood*, 28 W. R. 358; *Re Cambrian Mining Co.*, 50 L. J. Ch. 836.

(*p*) *Re Australian Direct Steam Navigation Co.*, L. R. 20 Eq. 325; *Re Rio Grande Do Sul Steamship Co.*, 5 Ch. D. 282.

(*q*) *Re Empire Mining Co.*, 44 Ch. D. 402. *Re Alabama, etc., Rail. Co.*, [1891] 1 Ch. 213.

(*r*) 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; Rules, 1883, Order XLVI.

(*s*) *Watts v. Jefferyes*, 3 Mac. & G. 372; *Bristed v. Wilkins*, 3 Hare, 235, *per WIGRAM, V.-C.*

Paragraphs
758—759

The same principle was applied to the provision (*t*) which restrained the judgment creditor (whose judgment was entered up before July 29th, 1864) from proceeding in equity to obtain the benefit of his charge, until after the expiration of a year from the entering up of his judgment.

The creditor was only restrained from proceeding to obtain the benefit of the charge, not from doing what was necessary to prevent the loss of the benefit; or from using all rights which he had acquired by virtue of the charge, when completed by possession under the execution. Therefore (*u*) a creditor, who had a charge upon a life interest, might have the income impounded in equity during the year, in order that after its expiration he might not lose the fruit of his charge by the failure of the subject of it. Being also entitled to proceed, either under the statute or independently of it (provided he had done what he could to obtain at law the benefit of his judgment) he might, if he had used an *elegit*, come into equity within the year for protection of the property, even if in the case of leaseholds he might not be relieved, as upon a wasting security, without the *elegit* (*x*). And when in possession under an execution, he may sue in equity for the redemption of a mortgage which his judgment entitles him to redeem (*y*).

Effect of
Judicature
Acts.

759. The effect of the Judicature Acts upon this statutory restriction appears doubtful. The courts might perhaps still act upon it by refusing the judgment creditor during the year any relief which was formerly only attainable in equity; but, as seems more reasonable, might hold that the restriction was virtually abolished by the fusion of the jurisdictions, as it is now held unnecessary for a judgment creditor to sue out an *elegit* before obtaining equitable execution (*z*). Having regard, however, to 27 & 28 Vict. c. 112, s. 4 (which abolishes the year with regard to judgments entered up since July 29th, 1864), the point is no longer of practical interest (**469**).

(*t*) 1 & 2 Vict. c. 110, s. 13. Inapplicable to judgments entered up since July 29th, 1864, 27 & 28 Vict. c. 112, s. 4.

(*u*) *Yescombe v. Landor*, 28 Beav. 80.

(*x*) *Partridge v. Foster*, 10 Jur. (N.S.) 741. As to the effect of 27 & 28 Vict. c. 112, s. 1, upon this section of 1 & 2 Vict. c. 110, see *Hatton v. Haywood*, L. R. 9 Ch. 229, 234.

(*y*) *Barnes v. Thrupp*, 3 Jur. (N.S.) 1242.

(*z*) *Exp. Evans, Re Watkins*, 13 Ch. D. 252.

SECTION IV.

Of the Statutes of Limitation in relation to the Rights and Remedies of the Mortgagee.

SUB-SECTION (1).—*How far Statutes limit the Creditor's right to recover the principal moneys and arrears of interest under the covenant for payment.*

	PARAGRAPH
Personal covenant for payment where the subject of the mortgage is land ..	760
Actions against a surety only barred after 20 years	761
Undertaking to pay what the security does not realize, does not postpone running of the statute	762
Covenants for payment in mortgage the subject of which is not land ..	763
Arrears of interest	764
Old decisions as to whether a creditor was barred who relied on creditor's administration suit	765
Creditor cannot claim benefit of suit which is not a general administration suit and where his debt is not admitted	766
Payment of interest or part of principal	767
Payment of interest, etc., preserves rights against collateral securities ..	768
Payment of rent by tenants is not sufficient	769
Payment by assignee of equity of redemption	770
How far payments by mortgagor or his agent affect his assignee	771
Acknowledgments sufficient to oust the 8th section of the Act of 1874 ..	772
By whom acknowledgment must be made	773
Acknowledgment by amanuensis	774
Acknowledgment by person filling double capacity	775
Acknowledgment must show that debt exists	776
Undisturbed possession by grantor of annuity is no bar if annuity has been paid	777
Securities arising under express trusts	778
One debtor not bound by payment or acknowledgment of co-debtor	779
Persons not pleading statute cannot enforce contribution	780
Marshalling not allowed where mortgage barred	781

SUB-SECTION (2).—*How far the Statutes limit the Creditor's right to Eject the Debtor or to Foreclose.*

General effect of statutes in mortgages of land	782
No corresponding statute applicable to mortgages of personal estate ..	783
When statutory period commences	784
Order for foreclosure gives mortgagee a new term for statute to run ..	785
Mortgagee defendant not bound by statute	786
Purchaser from mortgagor and mortgagee	787
Mortgagee who has received interest how far bound by possession of third party	788
Persons under disability	789
Where time has once commenced to run disability will not stop it	790
Statute runs from date of mortgage notwithstanding covenant for quiet enjoyment after default	791
Application of statute to mortgages of reversions	792
Statute does not run where mortgagee is also tenant for life of equity of redemption	793
Nor where wife is mortgagee of husband's estate	794
Nor where tenant for life pays off an incumbrance	795
Appointment of receiver does not prevent statute running against a stranger	796

Paragraph 760

SUB-SECTION (2).—How far the Statutes limit the Creditor's right to Eject the Debtor or to Foreclose (continued)—

	PARAGRAPH
Adverse possession not necessary	797
Concealed fraud	798
What arrears of interest recoverable out of the land	799
Statutes do not apply to arrears of interest where mortgagee exercises power of sale	800

The Statutes of Limitation (for the purpose of this section) must be considered in relation to—

- (1) The creditor's right to recover the principal money and arrears of interest on the covenant for payment; and
- (2) The creditor's right to eject the debtor from the mortgaged premises, and to bring an action of foreclosure.

SUB-SECTION (1).—How far Statutes limit the Creditor's right to recover the principal moneys and arrears of interest on the personal covenant for payment.

Covenants for payment where the subject of the mortgage is land.

760. By the statute 37 & 38 Vict. c. 57, s. 8 (1) (supplanting 3 & 4 Will. 4, c. 27, s. 40), it is provided that no action, suit, or proceeding shall be brought to *recover any sum of money secured by any mortgage, judgment, or lien (a), or otherwise charged upon (b) or payable out of any land or rent, at law or in equity, but within twelve (c) years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same (d), unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment (e) of the right thereto shall have been given, in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought, but within twelve years after such payment or acknowledgment or the last of such payments or acknowledgment, if more than one was given. This section affects not merely the remedy by foreclosure but also the remedy by action on the mortgagor's personal covenant to pay, the period of limitation for which (if the money were not secured by mortgage of land) would be twenty years (f).*

(a) This includes a vendor's lien. *Toft v. Stevenson*, 7 Hare, 1.

(b) This does not include bond debts, by which the heir is bound. (*Roddam v. Morley*, 2 Kay & J. 336 (C.A.), 1 De G. & J. 1.)

(c) 20 years under Acts of Will. 4, but altered to 12 by the Real Property Limitation Act, 1874.

(d) As to what constitutes a present right to receive, see *Hornsey Local Board v. Monarch Building Society*, 24 Q. B. D. 1.

(e) As to what constitutes an acknowledgment see *Firth v. Slingsley*, 58 L. T. 481.

(f) *Sutton v. Sutton*, 22 Ch. D. 511; *Fearnside v. Flint*, 22 Ch. D. 579; *Re England, Steward v. England*, [1895] 2 Ch. 820,

And the result is the same whether the personal remedy arises under the mortgage or under a collateral security. Nor does the fact that the estate mortgaged is a reversion or remainder suspend the operation of the statute on the covenant (*g*).

Paragraphs
760—763

761. But, nevertheless, this statute does not bar the remedy against a *surety* by bond, with regard to whom the 3rd section of the statute 3 & 4 Will. 4, c. 42, fixes the period of limitation at twenty years (*h*). Whether this period runs from the date when the debt first became due or from the time when demand is made of the surety seems doubtful (*i*).

Actions
against a
surety only
barred after
twenty years.

762. Where a collateral security is given which contains a proviso that after *default* the mortgagee may realize, and an undertaking by the mortgagor to pay *any balance* which the proceeds of realization may be insufficient to discharge, such undertaking does not raise a new debt so as to postpone the running of the statute until realization (*k*).

Undertaking
to pay what
the security
does not
realize, does
not postpone
running of
the statute.

763. It will be perceived that the above provisions only relate to covenants in, or covenants by the mortgagor collateral to mortgages of *land*. Covenants for payment contained in mortgages of other kinds of property are governed by the statute 3 & 4 Will. 4, c. 42, s. 3, which makes the period of limitation twenty years and not twelve. This statute also provides (s. 5) that if any acknowledgment shall have been made either by the debtor or his agent, or by part payment, or part satisfaction on account of any principal or interest, being then due thereon, the creditor may sue for the balance within twenty years after such acknowledgment, part payment or part satisfaction.

Covenants for
payment in
mortgage the
subject of
which is not
land.

In the case of *Kirkland v. Peatfield* (*g*) the late Mr. Justice Wright held that for the purposes of these statutes a debt secured on a reversionary interest in the proceeds of the sale of land directed to be sold by a will was "money charged upon or payable out of land" so as to make the statutory period of limitation twelve instead of twenty years; but it is humbly submitted that the decision cannot be supported, there having been a clear conversion.

It will be perceived that there is a marked difference between the acknowledgments required under these two statutes. Under the 37 & 38 Vict. c. 57, s. 8, relating to mortgages of *land*, the acknowledgment must be made *to the creditor* or his agent, whereas under the 3 & 4 Will. 4, c. 42, it need not be made to either (*l*).

(*g*) *Kirkland v. Peatfield*, [1903] 1 K. B. 756.

(*h*) *Re Powers, Lindsell v. Phillips*, 30 Ch. D. 291; *Re Frisby, Allison v. Frisby*, 43 Ch. D. 106 (COTTON, L.J. diss.).

(*i*) Cf. *Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300; and *Henton v. Paddison*, 68 L. T. 405; and *Re Frisby, Allison v. Frisby, supra*.

(*k*) *Re McHenry, McDermott v. Boyd*, [1894] 3 Ch. 290.

(*l*) *Moodie v. Bannister*, 4 Drew. 432.

Paragraphs
764—765

Arrears of
interest.

764. With regard to arrears of interest (owing to the language of s. 42 of 3 & 4 Will. 4, c. 27, which, unlike s. 8 of the Act of 1874, does not affect actions on a covenant as distinguished from actions against the land itself) twelve years' arrears can be recovered on an express covenant or bond for payment of interest contained in, or collateral to a mortgage of land, and twenty years' on a simple covenant or a covenant contained in a mortgage of property other than land (*m*). But, as will be seen presently (**799**), a mortgagee has only a *charge* on mortgaged land for six years' arrears (*n*).

Old decisions
as to whether
a creditor
was barred
who relied on
another
creditor's
administra-
tion suit.

765. Before the passing of the statute 3 & 4 Will. 4, c. 27, it was held (*o*), that, although a creditor's demand were in strictness barred by the rule of equity used by analogy to the old Statute of Limitations, yet that rule would not be applied against him, if it appeared that he had delayed his suit in confidence of the prosecution of an existing suit, by another creditor, on behalf of himself and other creditors; because every creditor has an inchoate right in such a suit, to the extent of its being considered as a demand. After the passing of the statute (s. 40), it was determined (*p*) that where a creditor, knowing nothing of the prosecution of a former suit, comes to the court after discovering that suit, and after the statute has otherwise barred his remedy, and claims payment out of a fund in court in the former suit, he shall have no relief; because the statute makes no exception in favour of a bill filed by one creditor for the benefit of the rest. But the question was left open, whether, if the creditor's suit were prosecuted with the knowledge and consent of him who afterwards claimed the benefit of it, and who had trusted to its prosecution, it would not so far be his suit that the statute would be inapplicable; and it was observed, that if the statute could be held not to apply, the creditor must give good reasons why he delayed to seek in his own person the help of the court. And, subject probably to that observation, it seems that the law remains as it was before the statute; and that a creditor may come (*q*) in under another creditor's action for the general benefit of creditors, filed or prosecuted with his knowledge before the

(*m*) See *Hunter v. Nockolds*, 1 Mac. & G. 640; *Sinclair v. Jackson*, 17 Beav. 405; *Shaw v. Johnson*, 1 Dr. & Sm. 412; *Darley v. Tennant*, 53 L. T. 257. As to interest on statutory securities issued by a railway company, see *Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74.

(*n*) 3 & 4 Will. 4, c. 27, s. 42; *Hodges v. Croydon Canal Co.*, 3 Beav. 86; *Mellersh v. Brown*, 45 Ch. D. 225.

(*o*) *Sterndale v. Hankinson*, 1 Sim. 393. The doctrine is far too broadly stated in the margin of the report. See the judgment and see the case explained, *Berrington v. Evans*, 1 Y. & C. Ex. Eq. at p. 438.

(*p*) *Berrington v. Evans*, 1 Y. & C. Ex. Eq. 434; followed in *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390; *Hutchins v. O'Sullivan*, 11 Ir. Eq. R. 443.

(*q*) *Birmingham v. Burke*, 2 Jo. & Lat. 699; the learned author of which decision also states that the case of *Sterndale v. Hankinson* is still law, both in England and Ireland, but to be cautiously applied since the statute. (Sugd. R. P. S. 123.)

decree to account and certificate made, where his demand would not have been barred had he himself brought the action, and where he comes in according to the decree and the course of the court (*r*). For it is thought to be but reasonable, where creditors come in under a decree in such a suit, to suppose that they were only lying by, because there was a suit in progress of which they could have the benefit; and it is impolitic to make a rule which would drive each creditor to begin a separate action, to recover his particular demand (*s*).

It is immaterial that the action does not profess to be brought on behalf of creditors; and if the suit be so constituted as to admit of a creditor coming in under the decree and proving his demand, the want of that averment will not shut him out (*t*). A mortgagee's suit (*u*) for sale of the estate, not purporting to be on behalf of all the creditors, and a decree therein after the mortgagor's death directing accounts of his estate, is only contingently for the benefit of creditors, who have no present right to go in and prove under the decree.

The benefit of a suit cannot be claimed under this rule, against the statute, by a person who, although made a party to the suit, was not served and did not appear, and whose name was afterwards struck out (*x*).

766. In a case (*y*) since the statute, in which a bill was filed by a creditor on his own behalf only, making another creditor, who claimed a lien for a debt on certain papers, a defendant, and praying the usual accounts and administration, and that the lien claimed, *if any*, might be ascertained, and the amount paid according to priority; it was held that this was not a suit of which the person claiming the lien could have the benefit *as a creditor, against the Statute of Limitations*. For, so far from his lien having been admitted, the bill prayed that the lien, if any, might be ascertained; and upon a petition by the claimant of the lien, praying an inquiry as to the amount due thereon, the court only directed a general inquiry as to incumbrances; so that the claimant was nowhere treated as a creditor in the decree or otherwise in the proceedings, except in the master's report, by which his debt was

Creditor cannot claim benefit of suit which is not a general administration suit, and where his debt is not admitted.

(*r*) See *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390; *Brown v. Lynch*, 3 Ir. Eq. R. 194.

(*s*) Apparently on somewhat similar considerations it has been held that where one holds a collateral security for the payment of a sum which is also secured by an express trust the statute does not begin to run against the collateral security until it becomes apparent that the express trust will not suffice to discharge the debt. See and consider *Bennett v. Cooper*, 9 Beav. 252; *Dillon v. Cruise*, 3 Ir. Eq. R. 70; and *Hunt v. Bateman*, 10 Ir. Eq. R. 360.

(*t*) *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 361; and see *Bennett v. Bernard*, 12 Ir. Eq. R. 229. And the observations there upon *Sterndale v. Hankinson*, *supra*.

(*u*) *Rankin v. Harwood*, 2 Ph. 22.

(*x*) *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390.

(*y*) *Watson v. Birch*, 15 Sim. 523.

Paragraphs
766—767

found to be due. This decision is doubted by a great authority (z), but stands, it is submitted, upon good reason. The prayer, that the lien, *if any*, might be ascertained, was certainly not an admission of the existence of the lien. It is like an offer to discharge a lien if it should be established, which does not bind if the lien be not established (a); and in like manner, admission to an estate, subject to an equity of redemption, *if any*, is no acknowledgment of a mortgage title (b). Nor could the fact, that the debt was found due by the master's report, amount to a recognition of its existence, for no inquiry was directed as to the particular debt; and it was this very report which was in question, and was alleged to be wrong, by reason that the debt had been barred by the statute.

Payment of
interest
or part of
principal.

767. The operation of the Real Property Limitation Act, 1874, c. 57, s. 8 (superseding 3 & 4 Will. 4, c. 27, s. 40), is prevented by payment of some part of the principal money, or some interest thereon, or by some acknowledgment of the right thereto given in writing, signed by the person *by whom* the same shall be payable, or his agent, *to the person entitled thereto*, or his agent. No action, suit, or proceeding being allowed after the expiration of twelve years after such payment or acknowledgment, or the last of them, if more than one (760). To take the case out of the statute, however, the money must have been paid by the mortgagor or his agent, or some person liable to pay. A mere voluntary payment by a third party will not suffice (c). Not even where it is paid by the third party to conceal his own fraud; *ex. gr.*, where the solicitor of the first mortgagee misappropriated the balance of the proceeds of sale and paid interest on them to the second mortgagee, it was held that the latter could not sue the first mortgagee after the expiration of twelve years from the sale (d). Payment by a surety is, however, sufficient (e). And so is payment by a person (*e.g.* a trustee (f)) bound to pay as between himself and the mortgagor (g). On the other hand, the realization—after the expiration of the twelve years, of a policy of assurance which forms a collateral security is not a part payment of principal or interest so as to revive a title to real estate which the statute has previously extinguished (h).

Under the statute of James I. (i), which did not provide for

(z) Sugd. R. P. S. 120.

(a) *Pelly v. Wathen*, 1 De G. M. & G. 16.

(b) *Hardy v. Reeves*, 4 Ves. 466; and see *Bligh v. Berson*, 7 Price, 205.

(c) *Newbould v. Smith*, 14 App. Cas. 423; *Chinnery v. Evans*, 11 H. L. C. 115; *Harlock v. Ashberry*, 19 Ch. D. 539.

(d) *Thorne v. Heard*, [1895] A. C. 495.

(e) *Cann v. Taylor*, 1 F. & F. 651.

(f) *Alston v. Mineard*, 51 Sol. J. 132.

(g) *Bradshaw v. Widdrington*, [1902] 2 Ch. 430.

(h) *Re Lord Clifden, Annaley v. Agar-Ellis*, [1900] 1 Ch. 774.

(i) 21 Jac. 1, c. 16.

acknowledgment by part payment, a payment out of personal estate would not keep alive a debt against realty which was also liable to pay it (*k*); for, except in cases of joint contract, one person cannot generally be bound by the admissions of another (*l*). Upon the same principle and authority, it was held, under the modern statute, that payment of interest by the devisee of the mortgagor, or receipt of rent by a creditor, in his character of incumbrancer on the real estate, ought not to preserve the debt against the debtor's personalty (*m*).

Paragraphs
767—769

768. Payment of interest upon, or part payment of the mortgage debt, will keep alive collateral securities against the statute (*n*). And although it has been determined under 3 & 4 Will. 4, c. 42, that the payment of interest by one devisee, upon whose estate a moiety of the testator's debts was charged, will not keep alive the remedy against the devisee under the same will of another estate, charged with the other moiety of the debts (*o*): yet as the words "the party liable" used in that statute must mean each or any of the persons liable, where there is more than one, the acknowledgment or payment by any one of several persons liable for the same debt, in respect of interests in the same estate, will preserve the remedy against the others. The payment, therefore, by a devisee for life, of interest on the testator's specialty, or simple contract (*p*) debt, will keep alive the right of action against the remainderman (*q*); and also against the original testator's estate (*r*); and so will payment by devisees in trust, under a will, against the beneficial devisee (*s*). But where the devisee of the equity of redemption is also tenant for life of the mortgage debt, he will not be presumed to have paid himself the interest out of the rents, so as to keep the debt alive against the mortgagor's personal estate (*t*).

Payment for
interest, etc.,
preserves
rights against
collateral
securities.

769. But payment by a tenant of the mortgaged property, in pursuance of notice by the mortgagee, was not a payment within

Payment of
rents by
tenants is not
sufficient.

(*k*) *Putnam v. Bates*, 3 Russ. 188.

(*l*) *Atkins v. Tredgold*, 2 B. & C. 23; *Slater v. Lawson*, 1 B. & Ad. 396.

(*m*) *Fordham v. Wallis*, 10 Hare, 217; *Re Gale, Blake v. Gale*, 22 Ch. D. 820; but cf. *Re Marsden, Bowden v. Layland*, 26 Ch. D. 783; and *Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 609, as to how far, if at all, an executor can under such circumstances rely on the statute as a defence to a charge of devastavit by the mortgagee.

(*n*) Sugd. R. P. S. 128, and cases cited there; *Dowling v. Ford*, 11 Mee. & W. 329.

(*o*) *Dickenson v. Teasdale*, 1 De G. J. & S. 52.

(*p*) *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225.

(*q*) *Roddam v. Morley*, 1 De G. & J. 1; *Pears v. Laing*, L. R. 12 Eq. 41; and see *The Fitzmaurice*, 15 Ir. Ch. R. 445; *Re Hollingshead, Hollingshead v. Webster*, 37 Ch. D. 651; *Barclay v. Owen*, 60 L. T. 220, and *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330, where the principle of *Roddam v. Morley* was approved and applied.

(*r*) *Dibb v. Walker*, [1893] 2 Ch. 429, à fortiori where the devisee is devisee in fee. *Leahy v. De Moleyns*, [1896] 1 Ir. R. 206.

(*s*) *Coope v. Cresswell*, L. R. 2 Eq. 106.

(*t*) *Re England, Steward v. England*, [1895] 2 Ch. 820.

Paragraphs
769—771

s. 40 of the statute 3 & 4 W. 4, c. 27, so as to preserve the right to sue for the mortgage debt, and is not now within s. 8 of 37 & 38 Vict. c. 57 (*u*).

Payment by
assignee of
redemption.

770. Where a mortgagor has assigned the equity of redemption and the assignee has paid interest on the mortgage, he has been held to be the agent of the mortgagor to save the limitation of the statute (*x*).

How far
payments by
mortgagor or
his agent
affects his
assigns,

771. The words “the person by whom the same shall be payable,” used in s. 40 of 3 & 4 Will. 4, c. 27, and s. 8 of the Act of 1874 (and which apply there both to the making of a payment and the signing an acknowledgment (*y*)), have been applied to the mortgagor, so as to make payments of interest by the receiver of the estate as his agent, sufficient to prevent the statute from barring the demand of the mortgagee as to estates included in his security, but which had been sold many years before by the mortgagor; and to the rents to which no recourse had been had for payment of interest (*z*). This decision appears at first sight to conflict with the construction put upon nearly similar words in 3 & 4 Will. 4, c. 42, by which the acknowledgment of the mortgagor was held to be unavailing to support the claim of the first mortgagee, to arrears of interest beyond the period limited by the statute, and to the detriment of *puisne* incumbrancers (*a*).

In the case of *Bolding v. Lane* the acknowledgment relied on did not (as was supposed by the learned judge who decided that case in the Court of Chancery, and who also took part in the decision of *Chinnery v. Evans*) consist of payment of interest by the mortgagor, but arose from a recital in a transfer of a *puisne* mortgage; though this circumstance has only a remote bearing upon the distinction between the cases, in each of which the rights of persons taking, subject to the first mortgage, were involved. In the one, the mortgagor's acknowledgment was, and in the other it was not, held sufficient to affect them. But if the decisions had been otherwise, the rights which the *puisne* incumbrancers had acquired in the latter case, by the neglect of the first mortgagee to obtain his interest, would have been taken from them for his benefit; whereas, in the former, the first incumbrancer, who was in no default, would have been deprived of his right in favour of persons who always held subject to it. The principle which reconciles the decisions appears to require that to make the acknowledgment sufficient under the statute, it must not only bind the person who

(*u*) *Cockburn v. Edwards*, 18 Ch. D. 449; *Harlock v. Ashberry*, 19 Ch. D. 539.

(*x*) *Forsyth v. Bristowe*, 8 Ex. 716; and see also *Ames v. Mannering*, 26 Beav. 583.

(*y*) *Chinnery v. Evans*, 11 H. L. C. 115.

(*z*) *Ibid*.

(*a*) *Bolding v. Lane*, 1 De G. J. & S. 122.

makes it, but must not affect the existing rights of any other person in the estate, whether such rights were acquired by the original contract, or by the operation of the statute itself.

772. As to the nature of the acknowledgment required by s. 8 of the Act of 1874, it was held (*b*) under the corresponding words in 3 & 4 Will. 4, c. 27, that the admission must have been made to the person entitled to make the demand or his agent, and with a view, on the part of the person acknowledging, of making himself liable to the demand. Therefore, a letter written by an executor, seeking to throw the burden of the debt upon another person, was held not to be within the statute; nor is a statutory declaration by the mortgagor as to the mortgage debt (*c*). But an admission made by a defence or other proceeding in a suit will be a good acknowledgment to the person entitled, if he be a party, though not the plaintiff in the suit (*d*); but where he is not a party, it seems to be otherwise (*e*). The Master's certificate, however, being a judicial document, and he deriving his authority from the court, and not being the agent of the parties, has been held to be no acknowledgment within the statute of a judgment debt; especially as the person entitled to the debt was no party to the suit. On the other hand, it has been thought (*f*) that the report itself, the debtor being a party to it, would give a new right to receive the money secured by the judgment, just as if the judgment itself had been revived.

773. The acknowledgment is to be made by the person by whom the money is payable, or his agent. In the case of an equitable lien, the person by whom the money is payable, is understood to be the person claiming the land out of which it is payable (*g*). The acknowledgment will also be sufficient if made by the trustee of the estate, whether he be a devisee in trust of the debtor (*h*) or a trustee appointed by the court (*i*).

774. A letter (*k*), professedly written and signed by an amanuensis for the person acknowledging, and sworn to have been written according to his dictation, and to have been signed in his presence, has been held to be a good acknowledgment by an agent; though the agency might probably be established on less particular, though substantial proof.

775. Where an acknowledgment is made by a person who fills a double character, as that of executor and beneficial devisee of the

Paragraphs
771—775

Acknowledgments sufficient to oust the 8th section of the Act of 1874.

By whom acknowledgment must be made.

Acknowledgment by amanuensis.

Acknowledgment by person filling

(*b*) *Holland v. Clark*, 1 Y. & Coll. C. C. 151.

(*c*) *Hervey v. Wynn*, 22 T. L. R. 93.

(*d*) *Blair v. Nugent*, 3 Jo. & Lat. 658, 677.

(*e*) *Hill v. Stawell*, 2 Jebb. & S. 389.

(*f*) *Sugd. R. P. S.* 131.

(*g*) *Toft v. Stevenson*, 1 De G. M. & G. 28.

(*h*) *St. John v. Boughton*, 9 Sim. 219.

(*i*) *Toft v. Stephenson*, *supra*.

(*k*) *St. John v. Boughton*, *supra*.

Paragraphs
775—778
double
capacity.

debtor, it is a general acknowledgment, and will not be applied to one character more than to the other, and the interest of the person making it as beneficial devisee will be affected (*l*). But if he be executor of one debtor, and be also a debtor individually, in respect of the same debt, an act done by him which he was bound to do in his individual character, and which amounts to an acknowledgment, will not be *primâ facie* considered to have been done as executor (*m*). He fills the place of two persons, and the question is, by whom the promise was made, and not what is the extent or effect of it.

Acknowledgment must show that debt exists.

776. The acknowledgment must show that the debt is subsisting; a mere recital that a mortgage of the property has been executed, and that the latter is still vested in the mortgagee, is not sufficient: for the mortgagee may be in possession, and yet may have satisfied himself out of the rents (*n*).

Undisturbed possession by grantor of annuity, is no bar if annuity has been paid.

777. An undisturbed possession during the whole period of limitation, by the grantor of an annuity and his representatives, of land charged with payment of the annuity, during which time the annuity has been punctually paid but no written acknowledgment has been given, does not operate (*o*) as a bar to the annuitant; though it seems to have been thought that the literal construction of the statute might have led to such a consequence.

Securities arising under express trusts.

778. The statute 3 & 4 Will. 4, c. 27, s. 25, provides that where any land or rent shall be vested in a trustee upon any express trust, time shall run against the right of the cestui que trust, or those claiming through him, to sue the trustee or those claiming through him, to recover such land or rent, only from the time when the trust estate shall have been conveyed to a purchaser for valuable consideration, and then only as against such purchaser and any person claiming through him. And after some doubt (*p*), it was held that this applied to the 40th and 42nd sections of the same Act (*q*).

The doctrine of the inapplicability of the Statute of Limitations to express trusts was again declared by s. 25, sub-s. (2), of the Judicature Act, 1873, which enacted that no claim of a cestui que trust, against his trustee, for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations (*r*).

(*l*) *Fordham v. Wallis*, 10 Hare, 217.

(*m*) *Way v. Bassett*, 5 Hare, 55.

(*n*) *Howcutt v. Bonser*, 3 Ex. 491.

(*o*) *Francis v. Grover*, 5 Hare, 39.

(*p*) *Law v. Bagwell*, 4 Dru. & War. 398; and see *Dillon v. Cruise*, 3 Ir. Eq. R. 70.

(*q*) *Young v. Lord Waterpark*, 13 Sim. 204; *Cox v. Dolman*, 2 De G. M. & G. 592; see also *Francis v. Grover*, 5 Hare, 39; *Hughes v. Williams*, 3 Mac. & G. 683; *Gough v. Bull*, 16 Sim. 323; *Earl Mansfield v. Ogle*, 1 Jur. (N.S.) 414. And it makes no difference that the term is reversionary; *Snow v. Booth*, 2 Jur. (N.S.) 37, 244.

(*r*) 36 & 37 Vict. c. 66, s. 25 (2); 37 & 38 Vict. c. 83, s. 2.

However, by the Real Property Limitation Act, 1874 (s), since January 1st, 1879, no action, suit, or other proceeding can be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust; or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

Paragraphs
778—780

Moreover, by the Trustee Act, 1888 (51 & 52 Vict. c. 59) since January 1st, 1890, express trustees can plead the Statute of Limitations in every case except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to receive trust property or the proceeds thereof still retained by the trustee, and converted to his use. As this statute only relates remotely to the law of securities, it is not considered necessary to refer to it at any length in this work.

779. The Mercantile Law Amendment Act (t) declares with reference to s. 3 of 3 & 4 Will. 4, c. 42, and other Acts, that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

One debtor
not bound by
payments or
acknowledg-
ment of
co-debtor.

780. Persons who have neglected to avail themselves of the Statute of Limitations, and who have been held liable to debts, which the statute, if it had been set up, would have barred, cannot

Persons not
pleading
statute
cannot

(s) 37 & 38 Vict. c. 57, s. 10. Even before this Act came into operation a mortgage in the form of a trust for sale was held to fall within the 28th section of 3 & 4 Will. 4, c. 27, and not within s. 25: *Locking v. Parker*, L. R. 8 Ch. 30; and see also *Dickenson v. Teesdale*, 1 De G. J. & S. 52, where it was held that a charge of real estate with payment of debts, with a direction to raise sufficient by mortgage or otherwise, did not create an express trust: *Toft v. Stevenson*, 7 Hare, 1; nor did s. 25 of the Act of Will. 4 apply to the trust upon which the mortgagee holds the estate after payment and until reconveyance. *Sands to Thompson*, 22 Ch. D. 614. A subsisting term agreed to be assigned upon trust for the mortgagee is an express trust by virtue of the agreement, though no assignment was executed; and though the term was outstanding and satisfied at the date of the mortgage, the effect of the assignment will not be prevented by merger under 8 & 9 Vict. c. 112. *Shaw v. Johnson*, 1 Dr. & Sm. 412. It will, however, be remembered, that a scheduled incumbrancer, in a deed containing trusts for payment of the scheduled debts, but who is no party to the deed, does not come within the description of a *cestui que trust* under an express trust for this purpose (*Walwyn v. Coutts*, 3 Sim. 14; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Johns v. James*, 8 Ch. D. 744; but cf. *Re Lord Annaly*, *Crawford v. Annaly* (the case of a receivership deed), 27 L. R. Ir. 523) unless the trust is not to come into operation until the death of the settlor; *Re Fitzgerald*, *Fitzgerald v. White*, 37 Ch. D. 18.

(t) 19 & 20 Vict. c. 97, s. 14.

Paragraphs
780—783

insist upon any right of contribution as against other parties, who, by means of the statute, have repelled the demand against them (*u*).

enforce
contribution.
Marshalling
not allowed
where
mortgage
barred.

781. Nor will the right to marshal assets be, in general, kept on foot for the purpose of indirectly giving a creditor a right to come upon real estate, after his remedy against it has been otherwise barred by the statute (*u*); though under special circumstances (as where a suit had miscarried by no fault of the plaintiff, but by a general misapprehension of the rights of the parties, and the bill had been properly framed for marshalling) a simple contract creditor was held, by virtue of the equity of marshalling, not to be barred by the statute (*x*) (**1386, 1396**).

SUB-SECTION (2).—*How far the Statutes limit the Creditor's right to Eject the Debtor or to Foreclose.*

General
effect of
statutes in
mortgages
of land.

782. By the combined effect of the statutes 3 & 4 Will. 4, c. 27, s. 24 (*y*), 7 Will. 4 & 1 Vict. c. 28, and 37 & 38 Vict. c. 57, ss. 1 and 9, a mortgagee's right to eject a mortgagor of land, or to bring an action of foreclosure (*z*), is barred at the end of twelve years next after the last payment of any part of the principal money or interest secured by such mortgage, and not till then, notwithstanding that more than twelve years may have elapsed since the time at which the right to make such entry or commence such action shall have first accrued. Nevertheless, when any acknowledgment of the title of the mortgagee shall have been given to *him or his agent* in writing signed *by the mortgagor* (not his agent), the statutory period only runs from the date of such acknowledgment (*a*). The statutes equally apply to an equitable as to a legal mortgage, even although there be a prior legal mortgage, and the prior legal mortgagee may have entered into possession during the currency of the statutory period (*b*). Moreover, the statutes apply even although the *debt* is not barred (*c*).

No corres-
ponding
statute
applicable
to mortgages
of personal
estate.

783. Curiously enough, however, the corresponding case of a mortgage of personal estate (other than leasehold land or personal chattels) has escaped the legislature so that there is no statute of limitations which applies to deprive a mortgagee of stocks or shares,

(*u*) *Fordham v. Wallis*, 10 Hare, 217.

(*x*) *Vickers v. Oliver*, 1 Y. & Coll. C. C. 211.

(*y*) Notwithstanding the peculiar wording of this section, which, if read literally, would exclude legal mortgages from its operation, it has been held to apply to all actions of foreclosure, whether the mortgagee has the legal estate or not; *Wrixon v. Vize*, 3 Dru. & War. 104, 118; and see also *Pugh v. Heath*, 7 App. Cas. 235; and *Harloch v. Ashberry*, 19 Ch. D. 539.

(*z*) *Pugh v. Heath*, *supra*.

(*a*) 3 & 4 Will. 4, c. 27, s. 14.

(*b*) *Samuel Johnson & Sons, Ltd. v. Brock*, [1907] 2 Ch. 533.

(*c*) *Kibble v. Fairthorne*, [1895] 1 Ch. 219.

of his security, even although the personal remedy by action on the covenant may have been barred (*d*). Paragraphs
783—789

784. The statutory period runs from the date when an action of foreclosure could have been first commenced, *ex. gr.*, where the mortgage contains a proviso that the debt shall not be called in for a certain time, the statute will not run until that time has elapsed (*e*). When
statutory
period
commences.

785. An order absolute for foreclosure vests in the mortgagee a new right to the estate, for the possession of which he may sue within twelve years from the date of the order (*f*). Order for
foreclosure
gives
mortgagee a
new term
for statute
to run.

786. A mortgagee who does not come to the court as a plaintiff to enforce his rights, but is made a defendant by a creditor to complete a purchaser's title and procure the distribution of funds set apart to indemnify him against the charge, is not bound by the statute (*g*). Mortgagee
defendant
not bound by
statute.

787. The purchaser of a mortgaged estate, to whom both the mortgagor and mortgagee convey, is a person claiming under a mortgage, although the mortgage no longer exists; and time runs from the payment of the mortgage debt and interest (*h*). Purchaser
from mort-
gagor and
mortgagee.

788. It was held by the Court of Appeal in *Thornton v. France* (*i*) that the title of a mortgagee, not barred as between him and the mortgagor, was nevertheless barred as between him and a stranger who was *at the date of the mortgage* in possession adversely to the mortgagor, and whose title subsequently became absolute by possession for twelve years. This case seems difficult to reconcile with *Doe d. Palmer v. Eyre* (*k*) and *Doe d. Baddeley v. Massey* (*l*), where the court appears to have come to a contrary conclusion. However, the mortgagee would certainly not be barred under similar circumstances if the adverse possession of the third party took place *after* the date of the mortgage (*m*). Mortgagee
who has
received
interest, how
far barred by
possession
of third
party.

789. An allowance of six years is made for persons under disability,—by reason of infancy, coverture, idiocy, lunacy, or unsoundness of mind (absence beyond seas being no longer a disability (*n*))—and their representatives, from the termination of the disability, or from death (*o*). No action can be brought by Persons
under
disability.

(*d*) *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161.

(*e*) *Re Turner, Turner v. Spencer*, 34 W. R. 153, see *Williams v. Morgan*, [1906] 1 Ch. 804.

(*f*) *Pugh v. Heath*, *supra*.

(*g*) *Murphy v. Sterne*, 1 Dru. & Wal. 236.

(*h*) *Doe d. Baddeley v. Massey*, 17 Q. B. 373.

(*i*) [1897] 2 Q. B. 143.

(*k*) 17 Q. B. 366.

(*l*) 17 Q. B. 373.

(*m*) *Ludbrook v. Ludbrook*, [1901] 2 K. B. 96.

(*n*) Real Property Limitation Act, 1874, c. 57, s. 4.

(*o*) Ten years under 3 & 4 Will. 4, c. 27, s. 16, reduced to six years, on and after January 1st, 1879 (Real Property Limitation Act, 1874, c. 57, s. 3).

Paragraphs
789—792

any person under disability when his right first accrued, but within thirty years next after the accruer of the right, though such disability may have lasted during the whole of that period, or though the term of six years from the cessation of any such disability shall not have expired (*p*). And where a person under disability at the accruer of the right shall die during the disability, no time to sue beyond the twelve years next after the accruer of the right, or the six years next after the death of the person under disability, shall be allowed by reason of the disability of any other person (*q*).

Where time
once
commenced
to run
disability
will not
stop it.

790. The right to sue must have accrued during the disability, and the Act gives no new equity in respect of a subsequent disability (*r*). So, under the old law, if time began to run during the life of the ancestor, it continued against the infant heir (*s*); and, running during a woman's discoverture, would continue after her marriage (*t*).

Where disability is relied on as an excuse for not coming to the court, the disability must be clearly stated. It is not enough to say generally, that there have been infancies, covertures or other disabilities, owing to which the plaintiff during part of the time has been unable to assert or prosecute his right (*u*). This was held under the old law in a case of redemption.

Statute runs
from date of
mortgage,
notwith-
standing
covenant
for quiet
enjoyment
after default.

791. Where a mortgage, executed only by the mortgagor, conveyed the legal estate at once to the mortgagee, and there was a covenant for quiet enjoyment *after* default, but no intention was shown that the mortgagor should enjoy the land, between the execution of the deed, and the time of default in payment of the money; it was held (*x*), that the covenant meant only that, *before* default, the mortgagee should rest upon his own title as against strangers; and time was held to run against the mortgagee from the date of the mortgage, and not from the day of default in payment.

Application
of statute to
mortgages
of reversions.

792. Although the mortgagee of a reversionary interest may (subject to express agreement to the contrary) foreclose even while the interest remains reversionary (*y*), yet the Statute of Limitations only commences to run against him from the time when the interest mortgaged falls into possession (*z*).

(*p*) Forty years and ten years by 3 & 4 Will. 4, c. 27, s. 17. Periods reduced to thirty years, and six years on and after January 1st, 1879 (Real Property Limitation Act, 1874, c. 57, ss. 5, 3).

(*q*) 3 & 4 Will. 4, c. 27, s. 18; Real Property Limitation Act, 1874, ss. 1, 3.

(*r*) *Goodall v. Skeratt*, 3 Drew. 216.

(*s*) *St. John v. Turner*, 2 Vern. 418.

(*t*) *Anon.*, 2 Atk. 333.

(*u*) *Blewitt v. Thomas*, 2 Ves. Jun. 669.

(*x*) *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553.

(*y*) *Sinclair v. Jackson*, 17 Beav. 405; *Humble v. Humble*, 24 Beav. 535.

(*z*) *Hugill v. Wilkinson*, 38 Ch. D. 480; *Re Hancock, Hancock v. Berrey*, 57 L. J. Ch. 793; *Re Lake*, 63 L. T. 416.

793. So long as the mortgagee is alone in receipt of the rents of the mortgaged estate (as if he be tenant for life of the equity of redemption) the statute does not run against the mortgage title. The interest is deemed to have been paid out of the rents by the tenant for life to himself as mortgagee, and the remainderman cannot allege that it was not paid for the purpose of setting up the statute. And the same rule holds good where the mortgage is vested in one set of trustees and the equity of redemption in the other, where the tenant for life of both is the same person (*a*). But it seems the court cannot assume that the interest was paid if the pleadings state that the rents were insufficient for the purpose (*b*). The rule seems to be the same where the incumbrancer is tenant in common of the estate; for a tenant in common is entitled to redeem the whole estate, as against an incumbrancer; and, subject to accounting with his co-tenant, he is entitled to receive the whole rent (*c*) (**1429**).

Paragraphs
793—795

Statute does not run where mortgagee is also tenant for life of equity of redemption.

794. On similar principles, where a wife is mortgagee of her husband's property, and they live together, he is presumed to have paid the interest, so as to keep alive the mortgage (*d*).

Nor where wife is mortgagee of husband's estate.

795. Where a tenant for life pays off a charge, though he take no steps for keeping it alive, it remains unmerged in favour of his personal representatives, notwithstanding the Statute of Limitations and the absence of part payment or acknowledgment; there being no assignable person to pay the charge, or who by the delay could be induced to suppose that the charge was merged; and the rent, out of which the interest was payable, being receivable by and belonging to the person entitled to the interest (*e*). Nor will this right be lost by reason of the form of the reconveyance (*f*). The reasoning of this rule, however, does not apply to the converse case where the owner in fee of the equity of redemption becomes equitable life tenant of the charge. In such a case no inference can arise that he intended to keep the charge alive by paying himself the interest, and therefore after he has been in possession for twelve years the *personal remedy* against the mortgagor's personal representatives will be barred (*g*). On the other hand, the remedy against the land will not be barred, as the owner of the fee having enjoyed both the

Nor where tenant for life pay off an incumbrance.

(*a*) *Topham v. Booth*, 35 Ch. D. 607. But see and consider *Re England, Steward v. England*, [1895] 2 Ch. 820.

(*b*) *Wynne v. Styan*, 2 Ph. 303. *Lord Carbery v. Preston*, 13 Ir. Eq. R. 455.

(*c*) *Wynne v. Styan*, *supra*. But see *contra*, *Re Finnegan*, [1906] 1 Ir. R. 370.

(*d*) *Re Burchell, Burchell v. Hawes*, 62, L. J. Ch. 463.

(*e*) *Burrell v. Earl of Egremont*, 7 Beav. 205; *Topham v. Booth*, *supra*.

(*f*) *Gifford v. Fitzhardinge*, [1899] 2 Ch. 32.

(*g*) *Re England, Steward v. England*, [1895] 2 Ch. 820, *Re Allen, Bassett v. Allen*, [1898] 2 Ch. 499.

Paragraphs
795—799

estate and the income of the charge would be met by the maxim *qui sensit commodum debet sentire et onus* (h).

Appointment
of receiver
does not
prevent
statute
running
against a
stranger.

796. The judicial appointment of a receiver of the incumbered estate does not prevent time from running against a stranger to the suit; but it does prevent it, in a court of equity, from running in his favour against the suitor; for the possession of the court is the suitor's possession, and against a person in possession time cannot run (i).

Adverse
possession
not neces-
sary.

797. The possession of the mortgagor is consistent with and not adverse to the rights of the mortgagee, except in case of renunciation of his rights by the latter, or under other special circumstances (k). But time runs under the Statute of Limitations against the mortgagee, although there be no adverse possession (l).

Concealed
fraud.

798. In every case of a concealed fraud, the right of any person to sue (m) for the recovery of *any land or rent* (which includes a foreclosure action) (n), of which he, or any one claiming through him, may have been deprived by such fraud, is deemed to have first accrued, when and not before such fraud shall, or with reasonable diligence might have been discovered, saving, however, the rights of *bonâ fide* purchasers for value, who have neither assisted in nor had notice of such fraud. But the rules of equity as to refusing relief to persons whose rights are not barred by the Act on the ground of acquiescence or otherwise, remain unaffected (o). And, moreover, the fraud must have been the fraud of, or in some way imputable to, the person who invokes the aid of the statute (p).

What arrears
of interest
recoverable
out of the
land.

799. As above stated (764), where there is an express covenant for payment of interest in a mortgage deed of land, s. 42 of the Act of 3 & 4 Will. 4, c. 27, does not apply to an action against the mortgagor or his heirs on the covenant, and consequently such an action can be brought under s. 8 of the Act of 1874, at any time within twelve years, or in other words, twelve years' arrears can be recovered against the mortgagor personally. Where, however, it is attempted to enforce arrears of interest against the land itself (*ex. gr.*, by bringing them into account in a foreclosure

(h) *Re England, Steward v. England*, *supra*, at p. 826.

(i) *Harrison v. Duignan*, 2 Dru. & War. 295; *Wrixon v. Vize*, 3 Dru. & War. 104; *Dixon v. Gayfere*, 17 Beav. 421.

(k) *Doe d. Jones v. Williams*, 5 Ad. & El. 291.

(l) *Wrixon v. Vize*, 3 Dru. & War. 104, 121.

(m) 3 & 4 Will. 4, c. 27, s. 26.

(n) *Pugh v. Heath*, 7 App. Cas. 235.

(o) 3 & 4 Will. 4, c. 27, s. 27.

(p) *Thorne v. Heard*, [1895] A. C. 495.

action (*q*), s. 42 of 3 & 4 Will. 4, c. 27, limits the amount recoverable to six years' arrears (*q*). But this is not so, where the mortgagor himself seeks to redeem (*r*). And, although ordinary specialty debts cannot be tacked to a mortgage as against a mortgagor himself (*s*), or his creditors assignees for value or devisees in trust for payment of his debts (*t*) or the assignee of his heir (*u*), yet (in order to avoid circuitry of action) a specialty debt may be tacked against the heir himself (*x*) and beneficial devisees or other volunteers claiming under him (*y*). Consequently, in a redemption action by the heir or beneficial devisee or voluntary assignee of a deceased mortgagor, it would seem that the mortgagee, where there is a covenant for payment of interest, can, under this doctrine of tacking, resist redemption unless twelve years' arrears be paid (*z*). Whether he can do so in a foreclosure action has never been decided, but on principle it is difficult to see why not (*a*). Although (as above stated) a mortgagor cannot in a redemption action plead the statute against a claim for more than six years, arrears of interest, yet that depends on the continued existence of the mortgage; and where the mortgage has been altogether barred, the rule does not apply—*ex. gr.*, where the barred mortgage was on a fund in court (*b*).

Paragraphs
799—800

800. It must be carefully noticed that the statute only bars *actions* for the recovery of the arrears out of the land. Consequently where a mortgagee realises his security by sale under a power, it is now settled that he can retain all interest due to him, and not merely six years' arrears (*c*). But where lands have been sold to a railway company under the Lands Clauses Consolidation Act, it has been held that this does not apply, as the money paid into court under such circumstances has, under the statute, the character of land (*d*). But the point cannot be considered as settled in view of the judgment of the Court of Appeal in *Re Lloyd, Lloyd v. Lloyd* (*r*).

Statutes do not apply to arrears of interest where mortgagee exercises power of sale.

(*q*) *Hunter v. Nockolds*, 1 Mac. & G. 640.

(*r*) *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Dingle v. Coppen*, [1899] 1 Ch. 726.

(*s*) *Challis v. Casborn*, Pr. Ch. 407; *Coleman v. Winch*, 1 P. Wms. 775.

(*t*) *Heams v. Bance*, 3 Atk. 630; *Irby v. Irby*, 22 Beav. 217.

(*u*) *Coleman v. Winch*, *supra*.

(*x*) *Morret v. Paske*, 2 Atk. 52; *Jones v. Smith*, 2 Ves. Jun. 372; *Thomas v. Thomas*, 22 Beav. 341.

(*y*) *Heams v. Bance*, *supra*; and *Troughton v. Troughton*, 3 Atk. 656.

(*z*) *Elvy v. Norwood*, 5 De G. & Sm. 240; *cf. Re Stead's Mortgaged Estates*, 2 Ch. D. at p. 718.

(*a*) See *Sinclair v. Jackson*, 17 Beav. 405; *Thomas v. Thomas*, *supra*.

(*b*) *Re Hazeldine's Trusts*, [1908] 1 Ch. 34.

(*c*) *Re Marshfield, Marshfield v. Hutchings*, 34 Ch. D. 721; following *Edmunds v. Waugh*, L. R. 1 Eq. 418; and *dis. from Mason v. Broadbent*, 33 Beav. 296.

(*d*) *Re Stead's Mortgaged Estates*, 2 Ch. D. 713.

Paragraphs
801—802

SECTION V.

Of the Onus on the Creditor of Proving the Security.

	PARAGRAPH
<i>How security may be proved</i>	801
<i>How far necessary to prove consideration</i>	802
<i>When necessary to prove validity of security</i>	803
<i>How far necessary to prove subsequent incumbrances at the hearing of foreclosure action</i>	804

How security
may be
proved.

801. The mortgagee can have no relief, unless the mortgage deed or security be admitted or proved (*e*).

Like other instruments, in the establishing of which proof of the handwriting of the person subscribing is necessary, it may be proved at the hearing, where its execution is not controverted, though its validity may be in question (*f*), either *viva voce* or by affidavit when the evidence is taken in that form. But it cannot be proved as an exhibit at the hearing, if it be impeached for fraud, especially if one of the attesting witnesses be alleged to have been concerned in the fraud by which the execution of the deed was obtained (*g*). Where the execution and the payment of the consideration are contested by a person who is not a party to the deed, it must be proved by the witness, though the mortgagor admit the execution, in order that there may be an opportunity for cross-examination (*h*).

If the security be attested by one witness only, who afterwards becomes entitled to the mortgage, proof of his handwriting, by a third person, will be sufficient evidence of the execution of the security (*i*). In case of the loss of the security it may be established by secondary evidence, and by proof of its existence as a security (*k*).

How far
necessary to
prove pay-
ment of con-
sideration.

802. The payment of the consideration money need not generally be proved, unless the fact be put in issue on the pleadings, the security being sufficient evidence of such payment (*l*); but a person claiming to be transferee of an equitable mortgage, must not only prove payment of the debt, but that it was his own money, or that he was to stand in the place of the original mortgagee (*m*). In the

(*e*) *Jacobs v. Richards*, 18 Beav. 300.

(*f*) *Booth v. Creswicke*, 8 Jur. 323.

(*g*) *Hitchcock v. Carew*, Kay, App. xiv.

(*h*) *Leigh v. Lloyd*, 35 Beav. 455.

(*i*) *Inman v. Parsons*, 4 Mad. 271.

(*k*) *Abington v. Green*, 14 W. R. 852; *Heath v. Crealock*, L. R. 10 Ch. 22.

(*l*) *Minot v. Eaton*, 4 L. J. (o.s.) Ch. 134.

(*m*) *Pandoorung, etc. v. Balkrishen, etc.*, 2 Moo. Indian App. 60.

case of a security given by a client to his attorney, strict evidence of the payment of the money has been required in Ireland (*n*). In England it appears that receipts are admitted as *primâ facie* evidence of advances; but where the security is for the balance found due on a settled account, the solicitor must be prepared with evidence that the client was not under pressure or undue influence, and that the account was stated upon the production of books or other proper evidence, and under circumstances which enabled the client to judge of the result of the transactions between himself and the solicitor (*o*); and where the security does not express the real nature of the transaction, it must also be supported by extrinsic evidence (*p*). And where there is room for the exercise of undue influence (as if a security be obtained by a person without consideration from a woman with whom he is under a contract of marriage) he must show that the transaction was fair and not procured by false representation. But this is only as between the parties giving and taking the benefit of the transaction; for no such duty is cast upon a purchaser of the security for valuable consideration, not privy to the fraud (*q*).

Paragraphs
802—803

803. The question whether the mortgage ever subsisted as a security, where (from the circumstances under which it was executed (*r*), the alleged lunacy of the mortgagor (*s*), or other matters) doubts have arisen on that point; or where the security is not proved on the one, or admitted on the other side (*t*), may be ascertained by inquiry, or by a jury. Declarations by a mortgagee who has made a prior voluntary settlement will not be admitted to prove advances by the mortgagee, so as to affect the interests of persons claiming under the settlement (*u*).

When
necessary to
prove validity
of security.

Where the lunacy of the mortgagor, prior to the execution of the mortgage deed, was set up by the defendant in a foreclosure suit, it was held that he was entitled to have its validity tried by an issue or by ejectment, without filing a cross bill to set it aside, although he had not cross-examined the attesting witnesses by whom it had been proved (*x*). It is, however, to be remembered, that to invalidate a contract by a person suspected or found to be

(*n*) *Lawless v. Mansfield*, 1 Dru. & War. 557, 605; and see *Carter v. Palmer*, 1 Dru. & Wal. 722, 8 Cl. & F. 657.

(*o*) *Judd v. Ollard*, 5 Jur. (N.S.) 755; *Davies v. Parry*, 5 Jur. (N.S.) 755; *Morgan v. Higgins*, 1 Giff. 270.

(*p*) *Per Lord ELDON in Lewes v. Morgan*, 5 Pr. at p. 143.

(*q*) *Cobbett v. Brock*, 20 Beav. 524; and see *Cooke v. Lamotte*, 15 Beav. 234; *Hoghton v. Hoghton*, 15 Beav. 278.

(*r*) *Melland v. Gray*, 5 Jur. 1004; *Wynne v. Styant*, 2 Ph. 303.

(*s*) *Snook v. Watts*, 11 Beav. 105.

(*t*) *Guardner v. Boucher*, 13 Beav. 68.

(*u*) *Doe d. Sweetland v. Webber*, 1 Ad. & El. 733.

(*x*) *Jacobs v. Richards*, 18 Beav. 300.

Paragraphs
803—804

a lunatic, it is not enough (y) to show lunacy at the date of the contract; it must also be shown *that the grantee knew, and took advantage of, the grantor's state of mind*. And if a mortgage be made without notice of the lunacy, and the money were duly paid (as to which, if there be any suspicious circumstances, the court will direct an inquiry), the security will be ordered to stand for the amount advanced, though lunacy, at the execution of the conveyance, be admitted at the hearing (z). It is immaterial in such cases whether the suit be by the mortgagee for foreclosure, or by persons claiming under the mortgagor to set aside the deed (a). And where an illegal agreement has been added to a security, a decree of foreclosure may be made upon non-payment of what shall be found due on the original mortgage, if general relief be prayed; though the suit will be dismissed, so far as it seeks relief founded on the illegal agreement (b). If a suit to deliver up securities on account of fraud, and for further relief, fails, the court does not decree redemption (c).

How far
necessary to
prove
subsequent
incumbrances
at hearing of
foreclosure
action.

804. In suits by the first mortgagee, if the plaintiff prove the subsequent incumbrances, he may at once have a decree for redemption or foreclosure against the owners of them, according to their priorities. But if the subsequent incumbrances be not proved or admitted, or if their priorities be disputed, the course is to direct an inquiry upon these questions (d). And there will be no decree, until the securities have been established, and the priorities of the respective incumbrances ascertained (e); for the incumbrancers cannot be excluded or postponed, without a declaration of their rights by the decree.

(y) *Niell v. Morley*, 9 Ves. 478; see also *Price v. Berrington*, 3 Mac. & G. 486; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

(z) *Kirkwall v. Flight*, 3 W. R. 529; *Campbell v. Hooper*, 1 Jur. (N.S.) 670.

(a) *Campbell v. Hooper*, *supra*.

(b) *Powney v. Blomberg*, 14 Sim. 179.

(c) *Johnson v. Fesenmeyer*, 25 Beav. 88.

(d) *Guardner v. Boucher*, 13 Beav. 68.

(e) *Duberly v. Day*, 14 Beav. 9.

CANADIAN NOTES

WHEN THE RIGHT TO SUE ARISES

WHERE the principal or interest is payable in instalments it has been held that upon default in payment by the mortgagor of an instalment of principal or interest the mortgagee has a right, independently of any express proviso in the mortgage to that effect, to call in the whole principal and interest and foreclose (*a*). But this right may be qualified by agreement. Thus where there is a stipulation that in default of payment of any instalment of interest for six months the whole principal should become due, it was held that a suit to foreclose could not be brought until after the six months had expired (*b*).

It is usual to insert a clause in the mortgage providing for acceleration on default. See the Act respecting Short Forms of Mortgages (*c*). It will be observed that the statutory form provides for acceleration only upon default in payment of interest. If the principal is payable in instalments a special provision may be inserted that the whole principal sum shall become due and payable upon default in payment of any instalment of principal. It was formerly contended, and in one case held, that a proviso of this kind was in the nature of a penalty against which equity would relieve (*d*). But it is now well settled that acceleration is to be regarded as the contract of the parties and not in the nature of a penalty against which relief will be granted (*e*).

The effect of the acceleration clause No. 16, Schedule B, of the Act respecting Short Forms of Mortgages, R.S.O., 1897,

(*a*) *Canada Settlers' Loan Co. v. Nicholles* (1896), 5 B. C. R. 41; *Cameron v. McRea* (1852), 3 Gr. 311.

(*b*) *Parker v. Vine Growers' Association* (1876), 23 G. 179.

(*c*) R. S. O. (1897), c. 126, Schedule B, clause 16. (See Short Forms Act, Manitoba, R. S. M. (1902), c. 157, and R. S. B. C. (1897), c. 142.)

(*d*) *Knapp v. Cameron* (1858), 6 Gr. 559.

(*e*) *Tylee v. Hinton* (1878), 3 Ont. App. 53, *Graham v. Ross* (1884), 6 Ont. 154; *Wilson v. Campbell* (1893), 15 P. R. 254.

ch. 126, which provides relief from the consequences of non-payment of moneys not payable by reason of lapse of time, is to give a right in every case to the mortgagor his heirs and assigns to pay all arrears and lawful charges, and the mortgagee has then no right to take further proceedings, except where a judgment has been recovered.

The plaintiff as assignee of the mortgagor was held entitled to restrain proceedings under the power of sale in the mortgage upon payment of arrears of interest and costs, the principal not being due except under the above acceleration clause (*f*).

Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making this principal payable as if the time for payment had fully come, and a right of action therefor then arises and the Statute of Limitations then begins to run (*g*).

After judgment has been recovered in an action on the covenant alone relief will not be granted. Thus where by virtue of an acceleration clause the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mortgagor in an action solely upon the covenant for payment contained in the mortgage deed, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside (*h*). On the other hand, actions of foreclosure or sale or for the recovery of possession are governed by the Rules. In such cases the defendant before judgment may have proceedings stayed upon paying into Court the amount then due for principal, interest and costs (*i*). Even in an action of foreclosure where the acceleration depended not on default in payment of interest but on default in building a house within the time

(*f*) *Robertson v. Hetherington* (1888), 8 C. L. T., Occ. N. 141; distinguished *Todd v. Linklater* (1901), 1 O. L. R. 103.

(*g*) *M'Fadden v. Brandon* (1904), 8 O. L. R. 610.

(*h*) *Wilson v. Campbell* (1893), 15 P. R. 254.

(*i*) *Ontario Consolidated Rules*, 388 and 389. (The corresponding Rules in Manitoba are 270 and 271. It would seem that these Rules apply even where there is an accelerating clause in the mortgage.) *Gemmell v. Burn* (1878), 7 P. R. 381; *Knapp v. Cameron* (1858), 6 Gr. 559.

stipulated for, the Court refused to interfere and granted judgment of foreclosure (*k*). In that case the defendant gave a mortgage to the plaintiff in which he covenanted to pay the mortgage money in nine equal annual instalments and also to build a house on the land within one year, and there was a proviso that the mortgage should immediately become due and payable after default being made in building the house within the time mentioned. No default occurred in payment of the mortgage money, but the house was not built until about a month after the expiry of the first year. It was held that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of covenant as to the erection of the house and to judgment for redemption or foreclosure.

It is not necessary that the acceleration clause should be in the words of the statute. Any form of words which expresses the agreement of the parties will be sufficient. If the statutory form is varied and there is no express provision for relief to the mortgagor, the mortgagee may call in the whole amount of the mortgage moneys and maintain an action on the covenant therefor (*l*). Where a mortgage payable in ten years contained a proviso that if the mortgagor mortgaged or otherwise incumbered the premises or suffered them to become liable to sale for taxes, the mortgage money should become immediately payable, the Court held that an assignment in insolvency, though voluntary, was not such an incumbering of the estate as entitled the mortgagee to call for payment of the mortgage money (*m*). Where the principal has become due by virtue of the mortgage contract on default in payment of interest, the mortgagee is not bound to sue for the whole accelerated sum. He may if he chooses seek to recover only the amount that has been matured. A mortgagor may pay off the mortgage debt after maturity of the mortgage without giving six months' notice, but a mortgagor cannot take advantage of his own default in payment before maturity and claim the right to pay off the

(*k*) *Graham v. Ross* (1883), 6 Ont. 154.

(*l*) *Graham v. Ross* (1883), 6 Ont. 154.

(*m*) *M'Kay v. M'Farlane* (1872), 19 Gr. 345.

whole mortgage debt (*n*). By s. 31 of the Act respecting Mortgages of Real Estate (*o*) it is provided that where pursuant to any condition or proviso in a mortgage a demand or notice has been given requiring payment of the moneys or declaring an intention to proceed to exercise the power of sale contained in the mortgage, no further proceeding shall be taken and no action shall be brought to enforce the mortgage until after the lapse of the time at or after which, according to the demand or notice, payment of the moneys is to be made or the power of sale is to be exercised or proceeded under, except by leave of a judge (*p*). In *Perry v. Perry* (*q*) it was held that the object of the statute is to prevent all other proceedings while the notice of sale is running, and it is not necessary under the statute in order to fulfil the very words of it that one of the acts should be prior to the other. After the issue of the writ of summons and service of a notice for motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed, the plaintiff without the leave required by section 31 served notice of exercising the power of sale. Before the hearing of the motion the plaintiff gave notice of abandonment of his notice of sale and of all costs in respect thereof. It was held that the effect of the notice of sale was to give the defendant time in which to pay off what was claimed, and unless the defendant was willing to release the plaintiff, he was bound by the notice; and the motion for judgment could not be entertained; but the object of the section would be fully attained by directing that the motion should stand over until after the expiration of thirty days mentioned in the notice (*r*). The publication of an advertisement for sale of lands is a "proceeding" within the meaning of the Act (*s*). A surety against whom a judgment has been recovered, which it has been agreed shall stand as additional or collateral security for the payment of the

(*n*) R. S. O. (1897), c. 121, s. 17.

(*o*) R. S. O. (1897), c. 121.

(*p*) *Perry v. Perry* (1884), 10 P. R. 275.

(*q*) (1884), 10 P. R. 275.

(*r*) *Lyon v. Ryerson* (1897), 17 P. R. 516.

(*s*) *Smith v. Brown* (1890), 20 Ont. 165. See also *Niel v. Almond* (1898), 29 Ont. 63.

deficiency is entitled to have the security realized before he can be called upon to pay anything (*t*). As to relief on payment of overdue part of the mortgage debt, although whole amount payable under acceleration clause in mortgage, see *National Trust v. Campbell* (1908), 17 Man. L. R. 587.

MORTGAGEE'S RIGHT OF ACTIONS, STATUTE AND LIMITATION

1. The limitation of the mortgagee's right to bring an action for foreclosure or possession is governed by s. 4 of the Real Property Limitation Act (*a*).

An action for foreclosure or sale in mortgage suits is an action for the recovery of land (*b*).

An action for redemption is also an action for the recovery of land (*c*).

The statute does not begin to run against a mortgagor of land in a state of nature until actual possession is taken by some person not claiming under him (*d*).

The "possession" referred to in s. 20 of the Real Property Limitation Act, R. S. M. (1902), c. 100, means an actual adverse possession and not a mere constructive possession of vacant lands by reason of the mortgagor being in default, and the mortgagor was not barred by the statute (*e*).

When a right of entry has accrued to the mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired by any one, the constructive possession is in the mortgagee, and the statute does not run against him, so as to extinguish his title to the lands, the mortgage being in default and no presumption of payment arising (*f*).

(*t*) *Teetor v. St. John* (1863), 10 Gr. 85.

(*a*) R. S. O. (1897), c. 133; and see R. S. N. S. (1900), c. 167, s. 9; C. S. N. B. (1903); R. S. Manitoba (1902), c. 100; R. S. B. C. (1897), c. 123, s. 16; *Whitman v. Hiltz* (1906), 1 E. L. R. 68.

(*b*) *Trust and Loan Co. v. Stevenson* (1892), 20: O. A. R. 66; *Barwick v. Barwick* (1874), 21 Gr. 39; *Fletcher v. Rodden* (1882), 1 O. R. 155.

(*c*) *Faulds v. Harper* (1886), 11 S. C. R. 639.

(*d*) *Bucknam v. Stewart* (1897), 11 Man. R. 625; *Delaney v. C. P. R. Co.* (1891), 21 O. R. 11; see, however, *Doe d. M'Lean v. Fish* (1849), 5 U. C. R. 295. The time commences to run in favour of a mortgagor when he ceases to recognize any right in favour of the mortgagee, *Stevenson v. Jeffers* (1907), 1 E. L. R. 471.

(*e*) *Bucknam v. Stewart* (1897), 11 M. R. 625, followed; *Campbell v. Imperial Loan Co.* (1908), 18 M. L. R. 144; 8 W. L. R. 502.

(*f*) *Delaney v. C. P. R. Co.* (1891), 21 O. R. 11, and see *post*, p. 774 m.

In 1876 the statute began to run against the owner of land and in favour of a trespasser in possession. In 1881 the owner mortgaged the land. The trespasser remained in possession until 1888, by which time the statute had barred the right of the owner. Held, that after the statute had begun to run against the owner of lands in favour of a trespasser, and the owner mortgages the lands, the mortgagee obtains a new right of entry, and the mortgagee may maintain an action against the trespasser within the statutory period, although the right of the mortgagor may have been barred (*g*).

A purchaser of lands, sold under a power of sale contained in the mortgage, is a person claiming under a mortgage within the meaning of s. 22, R. S. O. (1897), c. 133, and the statute began to run against him from the time of sale (*h*).

The execution and registration of a discharge of mortgage gives the statute a new starting point in favour of the mortgagor against a person claiming possession adversely (*i*).

If an acknowledgment of title in writing, signed by the person in possession, has been given to the person claiming foreclosure, or his agent, the right to bring an action shall be deemed to have accrued at and not before the time of such acknowledgment (*k*).

An acknowledgment to a trustee of the person entitled is sufficient to take a case out of the statute of limitations (*l*).

An acknowledgment made by the person in possession to the mortgagor, will have the effect of saving the mortgagor's rights (*m*).

Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land at any time within ten years next after the last payment of any part of the principal money or interest secured by the mortgage, although more than ten years may have elapsed since the time at which the right to bring the action first accrued (*n*).

(*g*) *Cameron v. Walker* (1890), 19 O. R. 212.

(*h*) *Cameron v. Walker*, *supra*.

(*i*) *Henderson v. Henderson* (1896), 23 O. A. R. 577.

(*k*) R. S. O. (1897), c. 133, s. 13.

(*l*) *M^cIntyre v. The Canada Co.* (1871), 18 Gr. 367.

(*m*) *Hooker v. Morrison* (1881), 28 Gr. 369.

(*n*) R. S. O. (1897), c. 133, s. 22.

Further time is given to persons under the disability of infancy, and lunacy, by ss. 43, 44, and 45 (*o*).

If no action is brought within the period limited by the Act, the right itself, as well as the remedy, is extinguished (*p*).

A mortgagee who has suffered the statute to run before he asserts his right of entry cannot, by afterward getting possession of the property, revive his title to it, but is a mere trespasser (*q*).

After the Statute of Limitations has run against a mortgagor of lands, service of a notice of sale by the mortgagee on the mortgagor does not give the mortgagor a right to redeem, the mortgagee's statutory title being in no way affected thereby (*r*).

Where a mortgagee has neither taken possession of the land after default, nor received interest within the statutory period the title is in the mortgagor, and the mortgagee cannot maintain an action of ejectment against a third person (*s*).

A purchaser in examining a title, found a mortgage which matured over eighty years previously, apparently outstanding, and required the vendors to produce the discharge of it, which they declined to do. Held, that under all the circumstances the mortgage must be presumed to have been paid (*t*).

In an action for foreclosure, the time does not run while the action is current (*u*).

It has been held that a proceeding under the Quieting Titles Act (*x*), is not an action or proceeding that will prevent the statute from running (*y*).

In an action for ejectment brought by the mortgagee to recover possession of the mortgaged lands in which judgment was obtained, but not executed, it was held that the action

(*o*) R. S. O. (1897), c. 133; and see *Hicks v. Williams* (1888), 15 O. R. 228.

(*p*) R. S. O. (1897), c. 133, s. 15.

(*q*) *Court v. Walsh* (1882), 1 O. R. 167; 9 O. A. R. 294; *Doe d. Dunlop v. McNab* (1859), 5 U. C. R. 289.

(*r*) *Shaw v. Coulter* (1906), 11 O. L. R. 630.

(*s*) *Doe d. McLean v. Fish* (1859), 5 U. C. R. 295.

(*t*) *Imperial Bank of Canada v. Metcalfe* (1886), 11 O. R. 467.

(*u*) *Turley v. Williamson* (1865), 13 U. C. C. P. 538.

(*x*) R. S. O. (1897), c. 135.

(*y*) *Laing v. Avery* (1867), 14 Gr. 33.

prevented the statute from operating as against the mortgagee seeking foreclosure (z).

A husband who with his wife had jointly mortgaged certain lands died in 1890, having appointed his wife his executrix and devised to her all his estate. The wife died in the same year, having appointed two executors and devised all her estate to the plaintiff. Default having been made in the payment of the mortgage which had been assigned to two persons as trustees, although no trust appeared on the face of the assignment, who had taken a renewal or a covenant to pay. Subsequent to the passing of s. 13, R. S. O. 1897, ch. 121, the surviving assignee brought an action against the wife's executors and obtained judgment of foreclosure and entered into possession. He subsequently sold the lands to one of the defendants, who also entered into possession, and mortgaged to the other defendant. In a redemption action brought by the daughter of the mortgagors against the defendants it was held that the husband and wife having died before the 4th of May, 1891, the equity of redemption at the time of the foreclosure action and judgment was vested in the wife's executors, so that the judgment recovered against them was effective, the daughter not being a necessary or proper party. Held also that the personal representatives of the deceased assignee were not necessary parties, for under s. 13 of the R. S. O. 1897, ch. 11, the mortgage was vested in the two assignees jointly so that the survivor was entitled to receive the money and enforce payment, although but for that statute, had the defendants objected, the personal representatives would have been necessary parties (a).

An action upon a mortgage for foreclosure was begun in 1898, and the usual judgment was pronounced upon the 30th January, 1899. One of the mortgagor defendants died on the 20th June, 1899, an infant unmarried and intestate. On the 2nd of May, 1900, a final order of foreclosure was granted, no notice being taken of the death of the infant and he and not his personal representatives or those claiming under him

(z) *M'Keen v. M'Kay* (1872), Russ. N. S. R. 121.

(a) *Plendsleith v. Smith* (1905), 10 O. L. R. 188.

being declared to stand absolutely debarred and foreclosed. Held, that the final order was irregular and was not binding on the infant's mother who was not a party to the action and in whom an undivided interest in the estate of her deceased son vested at the expiration of a year from his death; and that she was entitled to redeem and to be added as a defendant upon her own application (b).

The mortgagee brought an action of ejectment and recovered judgment, which he recorded, but took no further steps for twenty years. Held, that judgment and mortgage were both barred (c). See also *McVity v. Tranouth*, *post*, p. 670g.

Mortgagee's Right to Title Deed.

Sec. 27 of the Act respecting Mortgages of Real Estate (d) provides as follows:—

(27) At any time after the power of sale hereby conferred shall have become exercisable the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered, or assigned to and was then vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate is outstanding in a trustee the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

Section 39 of the Act respecting the Law and Transfer of Property (e) provides:—

(39) If any seller or mortgagor of land, or of any chattels real or personal, or choses in action conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such

(b) *Kennedy v. Fozzwell* (1906), 11 O. L. R. 389.

(c) *In re lands of James Ling* (1908) 43 N. S. R. 60.

(d) R. S. O. (1897), c. 121.

(e) R. S. O. (1897), c. 119.

seller or mortgagor, conceals any settlement deed, will, or other instrument material to the title or any incumbrance, from the purchaser or mortgagee or falsifies any pedigree upon which the title depends or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud such seller, mortgagor, solicitor, or agent shall, irrespective of any criminal liability he may thereby incur, be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instrument or incumbrance so concealed, or on any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate is recovered from such purchaser or mortgagee or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them in improvements on the land.

Sect. 2, R. S. O. (1897), c. 121, enables the person paying a mortgage to have the mortgage assigned to a third person, his nominee, *post*, p. 796a.

Assignees of Mortgage.

The defendant, the mortgagor, had conveyed away the equity of redemption. Default under the mortgage was admitted. Defendant was willing to pay if an assignment of mortgage were made to his nominee. On a motion for judgment for possession on default, it was held that defendant should have the case tried out (*f*).

The holder of two mortgages, while very ill and about to start on a journey for the benefit of his health, handed the mortgages and some title-deeds to the defendant, telling her that they were for her, and that he would execute an assignment of them to her if one were prepared and sent to him. The mortgagee died two months later, no assignment having been executed by him and one of the mortgages having been partially discharged by him. Held, that there had not been a *donatio mortis causa* of the mortgages, but merely an incomplete

(*f*) *Syms v. McGregor* (1909), 14 O. W. R. 748; 1 O. W. N. 94.

and ineffective gift *inter vivos*, and that the mortgages formed part of the mortgagee's estate (*g*).

The plaintiff, for the purpose of raising a portion of the purchase-money on a contemplated purchase of property, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff desired to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, paid the mortgagee and fraudulently procured from her an assignment of the mortgage to himself, which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud.

Held, that the plaintiff was entitled to a reconveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and could pass no better title to his assignee (*h*).

The owner of land mortgaged it and then, reserving a life estate to himself, conveyed it in fee subject to the mortgage. Held, that the grantee was not entitled, on payment of the mortgage, to an assignment of it to himself or his nominee under R. S. O. (1897), c. 121, s. 2, sub-s. 1 and 2, the mortgagee having notice of the equitable right of the grantor to have his life estate relieved of the burden by payment of the mortgage (*i*).

The defendant, when assigning a mortgage on lands to the plaintiffs, covenanted that the mortgagor would pay. The plaintiffs afterwards, without his consent, discharged half the lands from the mortgage on payment of half the mortgage debt. Held that this was such an alteration of the contract guaranteed as to release the defendant from his liability, whether the amount paid was the full value of the part released or not (*k*).

(*g*) *Ward v. Bradley* (1901), 1 O. L. R. 118.

(*h*) *McCormick v. Cockburn* (1900), 31 O. R. 436.

(*i*) *Leitch v. Leitch* (1901), 2 O. L. R. 233.

(*k*) *Farmer Loan and Savings Co. v. Patchett* (1903), 6 O. L. R. 255.

Defendant Grant mortgaged in April, 1902, certain lands to a firm of solicitors for \$650. The solicitors had a client, the plaintiff, to whom they assigned the mortgage. No notice of the assignment was given to the mortgagor until July, 1906. In May, 1906, Grant conveyed the land to defendant Kier. Kier did not know of the mortgage at the time of the bargain. When the purchase was being carried out Grant went with Kier to the solicitor's office, and paid Grant the purchase money, Grant paying part of it over to the solicitor in order to pay off the mortgage. As between Grant and the original mortgagee the mortgage was then fully discharged. Kier then knew of the mortgage. In an action of foreclosure brought by the plaintiff against Grant and Kier, the action was dismissed with costs as against both defendants (*l*).

When the consideration for which a mortgage was given failed, and the mortgage had meanwhile been assigned, it was held that plaintiff took the mortgage subject to stated account between the mortgagor and mortgagee (*m*).

In a mortgage action claiming payment of principal and interest, the defendant was the holder of the equity of redemption, and had covenanted with the mortgagor to assume the mortgage. When the action was commenced plaintiff had not an assignment of this covenant, but subsequently obtained it. On motion of defendant, the paragraph in statement of claim alleging obtaining of said assignment was struck out (*n*).

In 1899 plaintiff's husband mortgaged 100 acres to a loan company, plaintiff barring her dower, the mortgage containing a provision that the company and its assignees could release portions without affecting the remainder of the covenants. In 1900 the husband sold 85 acres of the property subject to the mortgage, which the purchaser covenanted to pay off, he giving a mortgage on the property sold for \$350 balance of the purchase-money. The husband died in 1903, having bequeathed to the plaintiff all his personal property, including the \$350 mortgage, also the unsold 15 acres, the latter while she lived

(*l*) *Watson v. Grant* (1907), 9 O. W. R. 53.

(*m*) *Swan v. Wheeler*, 11 W. L. R. 730.

(*n*) *Ronald v. Whitehead* (1908), 12 O. W. R. 1073.

and remained unmarried, and thereafter to his son. The plaintiff had also become the owner of a second mortgage made by the purchaser on the property sold. She married again, and the son, on the loan company threatening sale proceedings, arranged with the defendant to obtain an assignment of its mortgage, which he did, and to take proceedings to realize on the 85 acres in order that the fifteen acres might be freed from the mortgage. The plaintiff offered to pay off the loan company's mortgage on condition of getting an assignment of it, which was refused, but she was offered a discharge or an assignment of the debt covering the 85 acres with the 15 acres freed, which also was refused. In an action subsequently brought by her to compel an assignment or redemption, it was held that the plaintiff's rights as second mortgagee were confined to the 85 acres, and that she was not entitled to a reconveyance or assignment of the mortgage of the whole 100 acres. Held also that the design of the testator, as evidenced by his will, was to give the 15 acres to his son free from his mother's dower, and that her conduct in accepting the bequest under the will was a clear election to take under it (*o*).

A covenant by the assignor in an assignment that the mortgage assigned is a good and valid security does not mean that the mortgage is sufficient security for the debt, but only that it is a mortgage valid in law (*p*).

A covenant having been inserted in a mortgage without the knowledge of the parties to it or through a misapprehension as to its effect, a party can have the mistake rectified by striking out the covenant when it would be against equity for the other party to retain the benefit.

An assignment having been made of the mortgage, the assignee was held to have taken subject to all the equities affecting the mortgage, notwithstanding she took without knowledge that the covenant had been inserted by a mistake (*q*).

A power of sale is a personal power and cannot be exercised

(*o*) *Leitch v. Leitch* (1901), 2 O. L. R. 233, followed *Jones v. Shortreed* (1907), 14 O. L. R. 142.

(*p*) *Agricultural Savings and Loan Co. v. Webb* (1907), 15 O. L. R. 213.

(*q*) *Lawson v. Jones et al* (1899), 40 N. S. R. 103.

by the assignee without notice, unless the power of sale without notice is expressly reserved to him in the mortgage deed. It is otherwise in regard to a sale after two months' notice exercised under the statutory power which passes to the assigns of the mortgagee (*r*). Where the holder of a mortgage security, while labouring under an attack of sickness of which he subsequently died, indorsed on the indenture a memorandum assigning the same to his wife for the benefit of herself and his children, which he signed but did not seal, although the memorandum expressed it to be under seal. It was held that the wife took no interest under such assignment, either as a gift *inter vivos* or as a *donatio mortis causa*; and a bill filed by her to compel the executors to execute a formal assignment of the mortgage was dismissed with costs (*s*). Where a mortgagee by indorsement on the mortgage deed assigned to M. "his executors, administrators, and assigns, all his rights, title, and interest in and to the within mortgage" this was held insufficient to pass the land mortgaged (*t*). An assignment under seal annexed to a mortgage stated that the assignor "bargained, sold, assigned, and transferred" unto the assignee "his heirs and assigns the annexed mortgage and all the right, title, and interest therein" of the assignor "to have and to hold the same unto the said, etc., his heirs, and assigns to his and their sole use for ever." It was held that the land mortgaged did not pass by these words (*u*). An assignment by an administratrix, of a mortgage, being part of the assets of the intestate, was held valid, though not therein stated to be executed by her as administratrix (*x*). It is provided by the Act respecting the Law and Transfer of Property (*y*) as follows:—1. (6) "Conveyance" shall include feoffment, grant, assignment, appointment, lease, settlement, and other assurance, and covenant to

(*r*) *Re Gilchrist and Island* (1886), 11 Ont. 537. And see R. S. O. (1897), c. 121, s. 29. In Nova Scotia the corresponding section is R. S. N. S. (1884), c. 104, Order XLI.; in the North-West Territories a similar section is to be found in c. 41 of the Consolidated Ordinances of 1898.

(*s*) *Tiffany v. Clarke* (1858), 6 Gr. 474.

(*t*) *Moran v. Currie* (1857), 8 U. C. C. P. 60.

(*u*) *Auston v. Boulton* (1866), 16 U. C. C. P. 318.

(*x*) *Yarrington v. Lyon* (1866), 12 Gr. 308.

(*y*) R. S. O. (1897), c. 119, s. 1, sub-s. 6.

surrender, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property; and "convey" shall have a meaning corresponding with that of conveyance.

In New Brunswick it was held that a grant of "all lands situate in the province of New Brunswick of which the grantor was seised in fee" was insufficient to pass lands to which the grantor was entitled as mortgage (z). Under s. 33 of the Act respecting Mortgages of Real Estate (a), the purchaser in good faith of a mortgage may, to the extent of the mortgage, set up the defence of purchase for value without notice, except as against the mortgagor, his heirs, executors, and administrator. Section 36 of the Act respecting the Law and Transfer of Property (b) is as follows:—

36. It shall in no case be necessary in order to maintain the defence of a purchase for value without notice, to prove payment of the mortgage money or purchase money, or any part thereof.

In *Smart v. M'Ewan* (c) the registered owner of land mortgaged the same, and afterwards conveyed the property absolutely to a purchaser, who registered before the mortgage was registered and gave a second mortgage to his vendor to secure purchase-money. Subsequently the vendor assigned his mortgage to a purchaser who had no notice of the prior mortgage. It was held that the purchaser's mortgage in the hands of the assignee was subject to a lien or charge of the vendor's mortgagee. The purchaser may, under s. 33 of the Act respecting Mortgages of Real Estate set up this defence except as against the mortgagor his heirs, executors, administrators and assigns. In *Wright v. Leys* (d) the plaintiff, who was the mortgagee, alleged that the defendant Leys, the holder of the mortgage, purchased it from C with knowledge of the fact that C had purchased it from the original mortgagee as trustee for the plaintiff, and that the defendant Leys had purchased

(z) *Doe d. Holderness v. Donnelly* (1846), 3 Kerr. (N. B.) 238.

(a) R. S. O. (1897), c. 121.

(b) *Ibid.*, c. 119.

(c) (1871), 18 Gr. 623.

(d) (1884), 8 O. R. 88.

the mortgage from the prior holder subject to that equity. It was held that the agreement fell within the Statute of Frauds and should have been in writing, and that even if writing was not required the defendant Leys, who purchased in good faith for value and without notice of the agreement, could not be affected by it (*e*). Section 98 of the Registry Act (*f*) is as follows:—

98. No equitable lien, charge or interest affecting land shall be deemed valid in any court in this Province, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of the Act.

But where as between a mortgagee and his assignee the signature of the mortgagee to the assignment has been procured by the fraud and misrepresentations of a solicitor, the assignment is void, and the defence of purchase for value without notice will not avail (*g*). Where a person holding lands as trustee executed a mortgage at the request of the beneficial owners, and without any consideration to him therefor and the mortgage contained a covenant for payment of the mortgage debt, without the knowledge of the trustee or any intention on his part to become personally liable, it was held that an assignee of the mortgage for value without notice could not enforce payment against him (*h*). The purchaser having taken the assignment without inquiry as to the state of account was bound thereby (*i*). A mortgagor and mortgagee dealt together some years without any settlement of accounts and the former became insolvent. At the date of the insolvency there existed a right of set-off in favour of the mortgagor for the balance due to him on their general dealings. It was held that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity (*k*).

(*e*) And see *Bridges v. The Real Estate Loan and Debenture Co.* (1885), 8 O. R. 493.

(*f*) R. S. O. (1897), c. 136.

(*g*) *Herchmer v. Elliott* (1887), 14 O. R. 714.

(*h*) *Patterson v. M'Lean* (1891), 21 O. R. 221.

(*i*) *Pressey v. Trotter* (1878), 26 Gr. 154.

(*k*) *Court v. Holland* (1881), 29 Gr. 19, and see as to appropriation of payments by mortgagee, *Nixon v. Currey* (1909), 7 E. L. R. 269; *Canadian Bank of Commerce v. McDonald* (1906), 3 W. L. R. 90.

Where two persons were mortgagees, and one assigned his interest to the other, the mortgagor was allowed credit, as against the assignee, for goods delivered to the assignor, until he received notice of the assignment (*l*). Where a mortgagor, in a suit to foreclose, set up that before notice of assignment of the mortgage he had, at the instance of the mortgagee, incurred liabilities, and paid off debts of the mortgagee equal to the amount due on the mortgage, a reference was directed to the Master to inquire as to this; and it was directed that if this should be found to be so, the bill should be dismissed with costs (*m*). Where a mortgagor acknowledged in the mortgage deed to have received £250, although in fact he only received £91, it was held that as against an assignee of the mortgage who purchased in good faith for value without notice and before maturity of the mortgage, he could not redeem except on payment of the full amount. The rule that an assignee of a mortgage takes subject to all the existing equities and the state of accounts between the mortgagor and mortgagee was acted upon in a case where a married woman created a mortgage in which her husband joined, and it was agreed that any balance then due by the mortgagee to the husband as soon as ascertained should be applied on the mortgage, and that any future accounts that might become due to the husband for lumber or work should also be so applied. The mortgagee assigned the mortgage fifteen months afterwards to a purchaser without notice of this agreement. Held that the assignee was bound by the state of accounts between the original parties (*n*). Where the assignee has notice that the full amount was not advanced, although there is a receipt indorsed, he is bound by the actual state of the accounts (*o*).

A mortgage was held by an assignee for the benefit of the mortgagee who assigned it, and the mortgagor, without

(*l*) *Galbraith v. Morrison* (1860), 8 Gr. 289.

(*m*) *Baskerville v. Otterson* (1873), 20 Gr. 379; *Henderson v. Brown* (1871), 18 Gr. 79.

(*n*) *Pressey v. Trotter* (1878), 26 Gr. 154; *Eagleson v. Howe* (1879), 3 Ont. App. 566; *Manley v. London Loan Co.* (1896), 23 Ont. App. 139; 26 S. C. R. 443.

(*o*) *Manley v. London Loan Co.* (1896), 23 Ont. App. 139; 26 S. C. R. 443.

notice of such assignment, paid the mortgagee and obtained from him a discharge under the statute. The court held the payment good, and ordered the assignee to execute a release, it being doubtful whether under the circumstances the discharge from the mortgagee would revert the property in the mortgagor (*p*). The assignee of a mortgage, after maturity, takes the mortgage subject to all equities, as well as those of third parties, as those of parties to the instrument (*q*).

In New Brunswick it has been held that an assignee of a mortgagee in possession may set up the mortgage as a defence to an action of ejectment by the assignee of the equity of redemption, though the mortgage is more than twenty years old, and the right to recover thereon is barred by the Statute of Limitation (*r*). The assignee of a mortgage obtained a release of the equity of redemption which he sold for a sum considerably in excess of his claim against the assignor; it was held that he was bound to account to the assignor for the proceeds of such sale (*s*). Where a mortgagee in consideration of \$530, acknowledged to be paid, assigned to the plaintiff a mortgage for \$360 with a proviso that the assignment should be void on payment of \$530 and interest, but the assignor did not covenant to pay, it was held that no action could be maintained for the mortgage debt (*t*).

Where an assignor covenants to pay the mortgage moneys to the assignee if default be made by the mortgagor, the assignor thereby becomes a surety, and may be discharged if the assignee by agreement gives time for payment to the mortgagor without reserving the rights of the surety; and where the agreement is a material alteration of the original contract, as, for example, if it contains a stipulation for an increased rate of interest, the surety is discharged notwithstanding

(*p*) *McDonough v. Dougherty* (1862), 10 Gr. 42; see also *Engerson v. Smith* (1862), 9 Gr. 16. As to exchange of lands subject to mortgage, see *Gilleland v. Wadsworth* (1881), Ont. App. 82.

(*q*) *Elliott v. McConnell* (1874), 21 Gr. 276.

(*r*) *Doe d. Slason v. Hanson* (1857), 3 All. (N. B.) 427.

(*s*) *McLean v. Wilkins* (1887), 14 S. C. R. 22.

(*t*) *Pearman Hyland* (1862), 22 U. C. R. 202; *Hall v. Morley* (1853), 8 U. C. R. 584.

the reservation of his rights (*u*). But if the assignee takes a new mortgage for the same debt on the same land from a purchaser thereof from the mortgagor with an extended time for payment the assignee refusing at the same time to discharge the old mortgage, that will not be sufficient to discharge the assignor (*x*). An assignor is not liable to the assignee for the costs of an unsuccessful action to enforce the security. Thus, where the assignee brought a foreclosure suit upon a mortgage for £350, on which only £250 had been in fact advanced, and the court disallowed the additional £100 and costs of the suit, it was held that he could not recover these costs from his assignor, upon the covenant for validity of the security (*y*). The assignor of a mortgage is liable to the assignee on a covenant that the mortgage is a valid and subsisting security, if, before the assignment, the lands have been sold for taxes (*z*). Where a mortgagee assigned the mortgage, covenanting for the payment of the mortgage money, and subject to an agreement between the mortgagee and the assignee that the former might have a re-assignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenants, it was held that he was entitled to a lien therefor as against the mortgagor (*a*). See also *British Canadian Loan Co. v. Farmer*, *post*, p. 932*x*.

It is well settled that when a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of accounts between the mortgagor and mortgagee at the date of the transfer (*b*).

(*u*) *Bristol and West of England Land Co. v. Taylor* (1893), 24 O. R. 286; *Trust Corporation of Ontario v. Hood* (1896), 23 Ont. App. 589; *Quackenbush v. Brown* (1906), 7 O. W. R. 284; (1907) 10 O. W. R. 850.

(*x*) *Trusts Corporation of Ontario v. Hood* (1896), 23 Ont. App. 589.

(*y*) *Sturgess v. Bitner* (1861), 11 U. C. C. P. 102.

(*z*) *Real Estate Investment Co. v. Metropolitan Building Society* (1883), 3 O. R. 476.

(*a*) *Fleming v. Palmer* (1866), 12 Gr. 226.

(*b*) *Swan v. Wheeler* (1909), 11 W. L. R. 730.

LIMITATION OF ACTIONS ON COVENANT

THE right of the mortgagee to recover principal and interest in an action on the covenant may be barred by lapse of time. Where there is no covenant to pay interest only six years of interest can be recovered (*a*). In Ontario if a mortgage was made before the first day of July, 1894, the action must be commenced within twenty years after the cause of action arose (*b*). If the mortgage was made on or after the 1st of July, 1894, then actions upon any covenant in such mortgage must be brought within ten years after the cause of such actions arose (*c*).

In case the person entitled to bring the action is an infant or *non compos mentis* at the time when the cause of action accrues he may bring the action within such time after coming to or being of full age, or of sound memory, as other persons having no such impediment should, according to the provision of the Act, have done (*d*). In case the mortgagor is out of Ontario at the time the cause of action accrues the mortgagee may bring his action within such times as are limited by the Statute after the return of the mortgagor to Ontario (*e*).

The effect of the usual statutory provision contained in a mortgage, that in default of payment of the interest thereby secured, the principal thereby secured should become payable, is to make the principal due so soon as default in payment of

(*a*) *Wiley v. Ledyard* (1883), 10 P. R. 182.

(*b*) (Act respecting the Limitation of certain Actions) R. S. O. (1897), c. 72, s. 1, sub-s. 1 (*b*).

(*c*) R. S. O. (1897), c. 72, s. 1, sub-s. 1 (*h*).

(*d*) R. S. O. (1897), c. 72, s. 3.

(*e*) R. S. O. (1897), c. 72, s. 5.

the interest occurred so that the cause of action then accrues under section 1 of the act respecting the limitation of certain actions (*f*).

In case an acknowledgment is made by the person liable or his agent in writing or by part payment or part satisfaction, the person entitled may bring an action for the money within ten or twenty years, as the case may be, after such acknowledgment by writing or part payment or part satisfaction. And in case the person entitled is at the time of the acknowledgment under disability, or the person making the acknowledgment is at the time of making it out of Ontario, the action may be brought within twenty years or ten years, as the case may be, after the disability has ceased, or after the party has returned (*g*). Under the above provisions the mortgagee may recover in an action on the covenant twenty years' arrears of interest if his mortgage was made before the first day of July, 1894, and ten years' arrears if his mortgage was made on or after that date. The foregoing provisions are confined to the personal action on the covenant against the mortgagor or his personal representatives and do not apply to actions brought to realize the security out of the land, the period of limitation for the latter class of actions being fixed since the first day of July, 1877, at ten years (*h*). And so it has been held that although the mortgagee may not resort to the land after ten years, his right of action on the covenant where the mortgage was made before the first day of July, 1894, is nevertheless not barred until the lapse of twenty years (*i*).

A mortgage on land was given as additional security for the amount secured by a chattel mortgage. On default in payment a warrant was issued under the chattel mortgage and the goods were seized and taken out of the mortgagor's possession. Although a form of sale was gone through no sale actually took place, but the goods were taken possession of by the mortgagee and appropriated to his own use. More than ten years after,

(*f*) R. S. O. (1897), c. 72; *M'Fadden v. Brandon* (1903), 6 O. L. R. 247.

(*g*) R. S. O. (1897), c. 72, s. 8.

(*h*) Real Property Limitation Act, R. S. O. (1897), c. 133, s. 23.

(*i*) *Allen v. M'Tavish* (1878), 2 O. R. App. 278; *M'Donald v. M'Donald* (1886), 11 O. R. 187; *M'Donald v. Elliot* (1886), 12 O. R. 98.

the mortgagor's possession of the land not having been in any way interfered with, an assignee of the mortgagee attempted to exercise power of sale under the mortgage of the lands.

Held, that the intended sale was a "proceeding" under section 23, of R. S. O. 1897, ch. 133, which the assignee of the mortgagee was precluded from taking under that section after ten years. Held, also, that the mortgagee of the chattels having appropriated them to his own use and being unable to return them in proper plight and condition could not enforce payment of the mortgage debt (*k*).

Part payment to constitute an acknowledgment under the statute and keep the remedy alive must be made by a person liable on the indenture or his agent (*l*). An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person who is entitled to administer the creditor's estate and who does after the receipt of the letter take out such letters of administration is a sufficient acknowledgment within the statute (*m*). But in *Paxton v. Smith* (*n*), after the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment upon it out of his own moneys and on his own account was made by the surviving maker who was also the sole executor of his deceased co-maker. Held that such payment did not take the debt out of the Statute of Limitations. A decree in an administration action or proceeding, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running against debtors to the estate (*o*).

In an action on a covenant in a mortgage it was held that there had been a sufficient acknowledgment of the debt to revive it. Held, further, that defendant P. was not a trustee for defendant M (*p*).

(*k*) *McDonald v. Grundy* (1907), 8 O. L. R. 113.

(*l*) R. S. O. (1897), c. 72, s. 8.

(*m*) *Robertson v. Burrill* (1895), 22 O. R. App. 356.

(*n*) (1889), 18 O. R. 178.

(*o*) *Archor v. Severn* (1886), 12 O. R. 615; 14 O. R. App. 723.

(*p*) *Mitchell v. Rutherford*, 12 W. L. R. 55.

ACTION TO RECOVER THE MONEY OUT OF THE LAND.

The limitation of actions to recover mortgage moneys out of the land is governed by s. 23 of the Real Property Limitation Act (*q*). Steps taken to sell under a *fi fa* lands is a proceeding within the meaning of this section, *Neil v. Almond* (*r*). The Canadian Courts have held that the action on the covenant does not come within s. 23 of the Real Property Limitation Act (*s*), which provides that "no action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, etc." The words "out of any land or rent" are not in the English Act and were not in the Ontario Act until the revision of the statutes in 1887. In *McDonald v. McDonald* it was held that when a decision of the Court of Appeal in England is at variance with one of the Courts of Appeal in Ontario the decision of the Ontario Court of Appeal should be followed. A payment by the assignee of the equity of redemption keeps the debt alive as against the mortgagor (*t*).

In an action of redemption by a second mortgagee against a first mortgagee the latter is restricted to six years' arrears by s. 17 of the Real Property Limitation Act (*u*). The corresponding English enactment is 3 & 4 Will. IV. c. 27, s. 42, which is practically identical with the Ontario Act. This section does not relate to actions upon the covenant for payment but only to actions to enforce the charge against the land (*x*). The effect of these sections is that the mortgagee has a charge on the land and is in the position of a secured creditor for six years' arrears and that he is in a position of an unsecured creditor under covenant for payment for the remainder of the twenty or ten years' arrears as the case may be. Where

(*q*) R. S. O. (1897), c. 133.

(*r*) (1897), 29 O. R. 63.

(*s*) *McDonald v. Elliott* (1886), 12 O. R. 98; *McDonald v. McDonald* (1886), 11 Ont. 187; *Allan v. McTavish* (1878), 2 Ont. App. 278.

(*t*) *Trust and Loan Co. v. Stevenson* (1892), 20 Ont. App. 66.

(*u*) R. S. O. (1897), c. 133.

(*x*) *McMickling v. Gibbons* (1897), 24 Ont. App. 586.

no subsequent incumbrancer intervenes it is usual and proper to allow the mortgagee to tack all the interest recoverable on the covenant even beyond six years' arrears (*y*). But as against a subsequent incumbrancer seeking redemption whether the action be for foreclosure or redemption only six years' arrears will be allowed (*z*). There is no distinction between a redemption action and a foreclosure action as to the arrears of interest to be allowed (*a*).

In *Colquhoun v. Murray* (*b*) upon the sale of a property which was subject to mortgage the purchaser and the mortgagor inquired from the mortgagee the amount due and the mortgagee endorsed upon the mortgage and signed a memorandum fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage upon which there was stated to be due the amount claimed and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser. It was held that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit and that as against an encumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest. Where the mortgagee sells the land under the power of sale, the mortgagee may retain out of the proceeds of the sale all arrears of interest although they may exceed six years' of interest (*c*). And where proceedings for sale have been taken the mortgagee is only entitled to six years' arrears in an action to redeem brought by a second mortgagee (*d*).

R. T. in 1891 being about to marry W. T. and wishing to convey to him an interest in her land executed a deed of the same to a solicitor who then conveyed it to her and W. T. in

(*y*) *Carroll v. Robertson* (1868), 15 Gr. 173; *Taylor v. Hargrave* (1872), 19 Gr. 271; *Howeren v. Bradburn* (1875); *Allen v. M'Tavish* (1878), 2 Ont. App. 278; *M'Donald v. M'Donald* (1886), 11 O. R. 187; *M'Mickling v. Gibbons* (1897), 24 Ont. App. 586.

(*z*) *M'Mickling v. Gibbons* (1897), 24 Ont. App. 586 overruled; *Delaney v. Canadian Pacific Railway Co.* (1891), 21 O. R. 11.

(*a*) *Peoples Loan and Deposit Co. v. Grant* (1890) 18 S. C. R. 262 at p. 278; *M'Mickling v. Gibbons* (1897), 24 Ont. App. 586.

(*b*) (1899), 26 Ont. App. 204, 35 C. L. J. 452.

(*c*) *Ford v. Allen* (1869), 15 Gr. 565.

(*d*) *M'Mickling v. Gibbons* (1897), 24 Ont. App. 586.

fee. The solicitor registered the deed to himself but not the other, forging on the same a certificate of registry, and he in 1895 mortgaged the land and the mortgage was duly registered. R. T. and W. T. were in possession of the land all the time from 1891, and only discovered the fraud practised against them in 1902. In 1903 the mortgagee brought an action to enforce his mortgage. Held, affirming the judgment of the Court of Appeal (9 O. L. R. 105), that the legal title being in the solicitor from the time of the execution of the deed to him the Statute of Limitation began to run against him then and the right of action against the parties in possession was barred in 1901 (*e*). The limitation of six years' arrears does not apply as against a subsequent mortgagee where a prior mortgagee has been in possession one year next before action brought by the former. In such a case the subsequent mortgagee may recover the arrears of interest during the whole period of possession by the prior mortgagee; this is provided by s. 18. See also *British Canadian Loan and Agency Co. v. Farmer*, *post*, p. 932*x*, and *M'Fadden v. Brandon*, *ante*, p. 412*b*, as to when the statute begins to run.

(*e*) *M'Vite v. Tranouth* (1905), 36 S. C. R. 455.

CHAPTER V.

Of the Creditor's Personal Remedy against the Debtor.

	PARAGRAPH	Paragraph
<i>On breach of covenant for payment mortgagee may sue principal or surety</i>		805
<i>unless accounts have to be adjusted</i>	805	
<i>Personal remedy may now be joined with claim for foreclosure</i>	806	
<i>Where no express covenant, one is generally implied</i>	807	
<i>Where mortgage contains no covenant, express or implied mortgagee may sue for debt as simple contract one</i>	808	
<i>Quære how far legatee of mortgagee can sue the debtor personally</i>	809	
<i>Mortgagee cannot sue assignee of equity of redemption personally</i>	810	
<i>Construction of usual covenant in mortgage of policy to insurance company</i>	811	
<i>Statutory receipt on building society mortgage does not extinguish covenant to pay subscriptions</i>	812	
<i>Pawnee of chattels, etc., may sue pawnor for the debt</i>	813	

805. Every mortgage implies a loan, and every loan implies a debt, for which the borrower is personally liable, though he have neither entered into bond or covenant for payment of it; but the debt is of the nature of simple contract only, unless there be a bond or an express or implied covenant to give it the character of specialty (*a*). The principal secured by the mortgage, and the interest thereon, are distinct debts, and may be separately recovered (*b*). And upon the breach of an absolute covenant for payment of the debt on a certain day, the mortgagee may maintain an action on the covenant, whether the covenantor be principal or surety (*c*); unless the qualified form of the covenant implies that there is no personal contract for repayment, upon which an action can be brought: as where the covenantor, borrowing in the character of a trustee under a will, covenants for repayment out of money coming to his hands as trustee, from the mortgaged lands, or from the personal estate of the testator (*d*). Moreover, where,

Upon breach of covenant for payment mortgagee may sue principal or surety unless accounts have to be adjusted.

(*a*) *Thomas v. Terry*, Gilb. Eq. Rep. 110; *Meynell v. Howard*, Prec. Ch. 61. See *King v. King*, 3 P. Wms. 358; *Howel v. Price*, 1 P. Wms. 291, and *Ancaster v. Mayer*, 1 Bro. C. C. 454; *Exp. Digby*, Jac. 235.

(*b*) *Dickenson v. Harrison*, 4 Pr. 282.

(*c*) *Evans v. Jones*, 5 Mee. & W. 295; see *Barber v. Butcher*, 8 Q. B. 863.

(*d*) *Mathew v. Blackmore*, 1 H. & N. 762. See *Re Anglo-California Gold Mining Co.*, 16 W. R. 245, in the liquidation of which it was held that a mortgagee, under such circumstances, and the shares being fully paid up, could not require a call to be made.

Paragraphs
805—807

although the covenant is absolute in form, the mortgage was really given to secure the balance of an account current, that fact may be proved, and only so much as is due on the account can then be recovered (e). The right to sue is not prejudiced by the covenantee submitting to a decree for foreclosure at the suit of a prior mortgagee (f).

Personal
remedy
may be
joined with
claim for
foreclosure.

806. The personal remedy may now be joined with a claim for foreclosure, and in that case the order will be for payment of principal and interest within a reasonable time (usually one month) after the chief clerk's certificate, unless an immediate order is asked for by the pleadings and the amount proved at the hearing (g). Where such a claim is joined with a claim for foreclosure, judgment by default may be had for the money but not for the foreclosure (h). An action on the covenant after foreclosure reopens the latter (1967).

Where no
express
covenant,
one is
generally
implied.

807. A covenant for payment of the mortgaged debt will generally be implied, if the deed contain a stipulation for payment on a certain day (i). But if, as it sometimes happens in a mortgage of public works, the money be simply borrowed on the security of the property or undertaking and duties, without preference between creditors in respect of priority of advances, and the trustees are under no obligation to set aside part of the money received towards keeping down the interest, so as to give the creditors a legal right to insist on payment; or if there be a special provision for payment of the debt inconsistent with a right in the creditors to demand immediate payment, the interest is in effect merely payable out of the rates and duties; and the terms of the contract are satisfied by giving the lenders a claim against the undertaking, without a right to sue the corporation, notwithstanding a provision for payment of the interest at a fixed time. In the absence of a covenant for payment, no action will lie in such a case for principal or interest, not can the creditor compel the trustees by *mandamus* to pay the interest. The creditor can only enforce his rights as mortgagor of tolls, against the undertaking, or by determining the possession of the tolls by the trustees (k). It is different where the creditors

(e) *Trench v. Doran*, 20 L. R. Ir. 338.

(f) *Worthington v. Abbott*, [1910] 1 Ch. 588.

(g) *Farrer v. Lacy Hartland & Co.*, 25 Ch. D. 636, affirmed 31 Ch. D. 42; *Instone v. Elmslie*, 54 L. T. 730; and see *Lee v. Dunsford*, 54 L. J. Ch. 108; *Hunter v. Myatt*, 28 Ch. D. 181; and *Earl Poulett v. Viscount Hill*, [1893] 1 Ch. 277; *Williams v. Hunt*, [1905] 1 K. B. 512.

(h) *Bissett v. Jones*, 32 Ch. D. 635.

(i) *Hart v. Eastern Union Rail. Co.*, 7 Ex. 246; 8 Ex. 116; and see the provision to that effect in s. 50 of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16).

(k) *Pontet v. Basingstoke Canal Co.*, 3 Bing. N. C. 433; *Pardoe v. Price*, 11 Mee. & W. 427; *R. v. Trustees of Balby and Worksop Road*, 22 L. J. Q. B. 164; *Preston v. Corporation of Great Yarmouth*, L. R. 7 Ch. 655. See also *Pardoe v. Price*, 16 Mee. & W. 451.

are holders of bonds, though by virtue of them they have a lien on the moneys arising under the Act in proportion to their advances, as if mortgages without priority had been granted. The lien is then an additional security only, and every bondholder may sue on his own bond, because the company may have other property to answer his demand (l).

Paragraphs
807—811

A covenant for payment will be implied by an admission, coupled with an agreement to execute a security which would create a specialty debt; or even (m) by a mere admission in a deed, of liability; provided it do not appear that it was not the object of the deed to make the debtor liable on the covenant. If the deed were executed for the purpose of creating a security for the debt by other means, and the debt were referred to only for ascertaining the amount to be secured, or otherwise for a collateral purpose, (as by way of recital in an appointment of new trustees), no covenant will be implied, though the deed contain an admission or acknowledgment of the debt (n).

808. Where the mortgage contains no covenant for payment the mortgagee may sue for the debt, if the security be collateral to it, and was not taken in satisfaction of an existing debt. But if it have been so taken, the contract will have merged in the security which is of a higher nature; as (under like circumstances) the remedy on simple contract will merge in a bond or covenant (o) (1554).

Where mortgage contains no covenant express or implied, mortgagee may sue for debt as simple contract one.

809. Where the covenant for payment is only personal, a legatee of the debt could not formerly sue on the covenant in his own name, because such covenant was not assignable. Whether this is still so may be open to doubt. For although s. 25 of the Judicature Act, 1873, makes debts and other *choses in action* freely assignable by writing under the hand of the assignor, those words would scarcely apply to the case where an executor has merely assented to a legacy of the debt. Of course the *executor* could sue on such a covenant. An assignee cannot sue in respect of a breach of the covenant which happened before his own time (p).

Quære how far legatee of mortgage debt can sue the debtor personally.

810. The burden of such covenants does not run with the equity of redemption, and therefore the mortgagee cannot sue the assignee of that equity either for principal or interest, nor prove in his bankruptcy for them (q).

Mortgagee cannot sue assignee of equity of redemption personally.

811. Where the mortgagor of a policy of insurance, the insurers being the mortgagees, covenants with them to keep up the policy,

Construction of usual covenant in

(l) *Hill v. Manchester, etc., Waterworks Co.*, 2 B. & Ad. 544.

(m) *Saunders v. Milsome*, L. R. 2 Eq. 573.

(n) *Courtney v. Taylor*, 7 Scott, N. R. 749; *Marryat v. Marryat*, 28 Beav. 224; *Isaacson v. Harwood*, L. R. 3 Ch. 225.

(o) *Yates v. Aston*, 4 Q. B. 182; *Price v. Moulton*, 10 C. B. 561. See *Holmes v. Bell*, 3 Man. & Gr. 213; *Norfolk Rail. Co. v. M'Namara*, 3 Ex. 628.

(p) *Canham v. Rust*, 2 Moore, 164.

(q) *Re Errington, Exp. Mason*, [1894] 1 Q. B. 11.

Paragraphs
811—813

mortgage of
policy to
insurance
company.

Statutory
receipt on
building
society
mortgage
does not
extinguish
covenant
to pay
subscription.

Pawnee of
chattels, etc.,
may sue
pawnor for
the debt.

or in default that the insurers may pay and add the premiums to the mortgage debt, but there is no covenant to repay them the premiums, the mortgagees, in an action against the mortgagor for breach of the covenant to keep up the policy, are entitled only to nominal damages, the addition of the premiums to the debt being the remedy provided; but under a covenant to repay, the amount paid would have been given as damages (*r*).

812. Although the statutory receipt indorsed on a mortgage to a benefit building, or a friendly society, vacates the mortgage, a covenant in the deed, for payment of the subscriptions due to the society, is not extinguished; and though the deed be required to be given up, a copy of it may be preserved for the purposes of the covenant (*s*).

813. The pawnee of stock, or of an ordinary chattel, may also sue the pawnor for the debt, whether the pawn were effected by himself or his agent, under an express or implied authority to recover the sum due, unless there be a special agreement that the pledge only shall be liable; and he may recover without returning the pledge, for which the debtor must bring trover (*t*). If in consequence of the wrongful conversion of the pawn by the pawnee, the pawnor has recovered the value of it by action, the debt remains, unless it was deducted in the action (*u*). So where (the pawn being of a perishable nature, and no time for redemption limited) the pledgor stays till it is perished and spoilt, there being no default in the pledgee, he shall have debt for his money, and the other no remedy for his pawn (*x*).

(*r*) *Brown v. Price*, 4 Jur. (N.S.) 882. In a recent case it was held that a covenant with an ordinary mortgagee of a policy "not to do or suffer anything whereby the policy may become voidable or void" was not broken by the mortgagor allowing the insurance company to take over a fully paid-up policy at surrender value, *Sapio v. Hackney*, 51 Sol. J. 428.

(*s*) *Farmer v. Smith*, 4 H. & N. 196. See 6 & 7 Will. 4, c. 32, s. 5; Building Societies Act, 1874, c. 42, s. 42; Friendly Societies Act, 1875, c. 60, s. 16 (7).

(*t*) *South Sea Co. v. Duncomb*, 2 Str. 919; *Lawton v. Newland*, 2 Stark. 72. *Per* HOLT, C.J., *Anon.*, 12 Mod. 564.

(*u*) Story, Bailments, § 315.

(*x*) *Per* FLEMING, C.J., *Ratcliffe v. Davis*, Yelv. 178.

CANADIAN NOTES.

THE COVENANT FOR PAYMENT.

UNDER the covenant for payment the mortgagee is entitled to recover the principal and interest, if any, and in certain cases the cost and expenses which he has properly incurred in connection with the security. Where a proper sale has been made and the amount realized is not sufficient to satisfy the mortgage moneys and costs of sale the deficiency may be recovered from the mortgagor. A mortgagee who has *bonâ fide* exercised a power of sale may sue on the covenant for a deficiency either a surety or the original debtor. He may not sue unless the sale has been *bonâ fide*. Thus where the sale was not *bonâ fide*, but was intended to and did cut out the equity of redemption, while payment of the debt was still intended to be enforced, the mortgagee, having deprived himself of the power to reconvey, was restrained from enforcing a judgment on the covenant (a). And where at a sale of mortgaged property held pursuant to an order for foreclosure and sale the mortgagee became the purchaser for a sum less than the amount of the mortgage, and then conveyed the property to a third party and afterwards sued on a bond collateral to the mortgage to recover the balance due after crediting the net proceeds of the sale, it was held that the mortgagee was entitled to recover (b). But where after the mortgagor had assigned his equity of redemption the mortgagee, with the concurrence of the assignee, by sale and transfer of the mortgaged premises, put it out of his power to reconvey on redemption by the mortgagor, it was held that he could not call upon the mortgagor

(a) *Cratty v. Taylor* (1892), 8 Man. R. 188.

(b) *Kenny v. Chisholm* (1883), 19 N. S. R. 497; 8 C. L. T. 62 (affirmed on appeal to the Supreme Court of Canada, 16th February, 1886).

A mortgagee may obtain all relief in respect of his mortgage debt by one action, but if he does not do this he can bring a subsequent action on the covenant for the deficiency. *McNeil v. O'Connor* (1907), 2 E. L. R. 288.

for payment of any deficiency resulting upon such sale of the estate (*c*). If in the negotiations for a loan to be secured by a mortgage the mortgagee stipulates for a bonus or special commission or other charge in consideration of advancing the money and in addition to the interest, he may retain it if he deducts the amount at the time from the loan and only advances the balance, or in case the amount is afterwards paid and settled; but otherwise such bonus or special advantage cannot be recovered or allowed in equity (*d*). Where the mortgage debt is payable in lawful money of the United States of America the mortgagee in seeking to foreclose is entitled only to claim the amount in the current money of that country or its equivalent at the time of default in payment or at any time subsequently at his option (*e*).

The Court under the Insolvent Act of 1875, would not order *fi. fa.* against an insolvent mortgagor whose estate has, after he has obtained a discharge, been reconveyed to him, although it may be that the mortgagee would be entitled to call upon the mortgagor to release his equity of redemption (*f*). A mortgagee cannot sue the mortgagor on his covenant unless he is in a position to recover the mortgaged property to him intact. If the mortgagee has obtained a final order for foreclosure, he may still sue on the covenant for payment if he is in a position to reconvey the estate (*g*). But although the fact of a mortgagee having obtained a final order for foreclosure does not preclude him from suing for the mortgagee money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines to receive the money the Court would restrain him from afterwards suing for the mortgage debt (*h*). If after a mortgagee has obtained a final order for foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the

(*c*) *Burnham v. Galt* (1869), 16 Gr. 417.

(*d*) *Phillips v. Prout* (1892), 12 Man. 143; following *Mainland v. Upjohn* (1889), 41 C. D. 126.

(*e*) *Morrell v. Ward* (1863), 10 Gr. 231; *Crawford v. Beard* (1864), 14 U. C. C. P. 87.

(*f*) *Smith v. Elliot* (1878), 25 Gr. 598.

(*g*) *Bank of Toronto v. Irvin* (1881), 28 Gr. 397.

(*h*) *Manson v. Hauss* (1875), 22 Gr. 279.

mortgage money, if at the time of bringing the action he has paid off the mortgage created by himself, and is in a position to reconvey the estate, neither does the fact of his having allowed the premises to fall into decay prevent him from so suing (*i*).

A mortgagee who deals with mortgaged property in such a way as to make it impossible to restore it to the mortgagor on payment of the money secured by the mortgage cannot recover on the covenant (*k*).

Where the mortgagee with the concurrence of the person who after the mortgage was given purchased the equity of redemption but without the concurrence of the mortgagor made a sale of the lands, it was held that the mortgagee could not recover the deficiency from the mortgagor (*l*). If a mortgagee releases part of the mortgaged premises without the consent of the mortgagor and so becomes unable to reconvey, he cannot afterwards sue on the covenant for payment. Where the mortgagee and the mortgagor sold and conveyed part of the mortgaged property without the concurrence of a person to whom subsequently to the mortgage the mortgagor had sold the remainder of the property and whose interest was known to the mortgagee and the mortgagee covenanted for freedom from incumbrances, it was held that the mortgagee having thereby put it out of his power to reconvey the whole of the mortgaged property could not call on the owner of the remaining portion for payment of the balance of the mortgage money (*m*). This rule does not apply where the sale is under a power contained in the mortgage. But it applies to a sale under a decree in a suit to which the owner of the unsold portion was not a party (*n*). Where the mortgagee's right to claim a lien on the unsold portion has been put an end to, it is not revived by his obtaining two years afterwards the consent of the first purchaser to a reconveyance on payment of the mortgage money (*o*).

(*i*) *Manson v. Hauss* (1875), 22 Gr. 279.

(*k*) *National Trust Company v. Bomfield* (1906), 4 W. L. R. 575.

(*l*) *British and Canadian Loan Co. v. Williams* (1888), 15 Ont. 366.

(*m*) *Gowland v. Garbutt* (1867), 13 Gr. 578; *Nation Trust Co. v. Bonsfield* (1906), W. L. R. 575.

(*n*) *Gowland v. Garbutt* (1867), 13 Gr. 578.

(*o*) *Gowland v. Garbutt* (1867), 13 Gr. 578; *Guthrie v. Shields*, 13 Gr. 584.

A mortgagee who without special power to that effect sells the mortgaged property on credit, is chargeable with the purchase price as if it had been received by him in cash. The principle that a mortgagee cannot sue the mortgagor on his covenant unless he is in a position to reconvey the mortgaged property to him intact does not apply to the case when the mortgagee is in a position to restore the whole of the mortgaged land, but owing to the removal or destruction of a building on the mortgaged land, the property is not in the condition in which it was when the mortgagee took possession. It might be otherwise if the building was of such a character that compensation in money for its removal or destruction would not be an adequate indemnity (*p*).

A mortgagee not only discharged a portion of the mortgaged lands upon part payment as he was entitled to do under the mortgage, but also assented to a right of way across the whole of the property granted by the then owners of the equity to a purchaser of a portion of it, and released such right of way from his mortgage. Held, that the mortgagee having debarred himself from restoring the mortgaged lands unaltered in character and quantity, in a manner unauthorized by the terms of the mortgage, owing to the right of way, an assignee of the mortgage could not claim under the covenant in an administration of the mortgagor's estate. It is proper, however, in such a case that the claimant should have an opportunity within a limited time to get into a position so to restore the land, and twenty days were here allowed for the purpose (*q*). Where a mortgagor conveyed part of the mortgaged property to a purchaser and gave a covenant against incumbrances and the mortgagee subsequently released the part so sold from his mortgage, it was held that as the release was in accordance with the mortgagor's own obligation as to that part it did not effect the mortgagee's right to recover the mortgage debt or his lien on the rest of the mortgaged property (*r*). Where the mortgagor has conveyed his equity of redemption, he may be

(*p*) *In re Thuresson* (1902), 3 O. L. R. 271 distinguished; *Mendels v. Gibson* (1905), 9 O. L. R. 94.

(*q*) *In re Thuresson, McKenzie v. Thuresson* (1901), 3 O. L. R. 271.

(*r*) *Crawford v. Armour* (1867), 13 Gr. 576.

discharged from his liability under the covenant for payment if the mortgagee deals with the purchaser of the equity to his prejudice (s). In *Trust and Loan Co. v. M'Kenzie* (t), which was an action on the covenant for payment, the mortgagees entered into an agreement with the owner of the equity of redemption to extend the time for payment in consideration of his agreeing to pay the mortgage debt at an increased rate of interest. But if in such an agreement to extend the time for payment the rights of the mortgagee against the mortgagor are expressly reserved, the mortgagor will not be discharged (u). And where the assignee of the equity simply covenants with the mortgagor for payment there is no privity between the assignee of the equity and the mortgagee, and the mortgagor remains liable on his covenant, and the right of action will not be impaired (x). In *M'Cuaig v. Barber* (y), which was an action on the covenant for payment, a mortgagor of land sold the equity and took from the purchaser a covenant to pay off the mortgage which he assigned to the mortgagee. The mortgagee afterwards took by assignment from the purchaser of the equity the benefit of similar covenants from three other sub-purchasers and agreed to exhaust the remedies against the latter before suing the purchaser. It was held that the mortgagee being the sole owner of the covenant of the purchaser of the equity with the mortgagor assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and the purchaser. The mortgagee therefore had no present right of action on the covenant in the mortgage (z).

A mortgage on her own property made by a wife to the

(s) *Mathers v. Helliwell* (1863), 10 Gr. 172; *Aldous v. Hicks* (1891), 21 Ont. 95; *Trust and Loan Co. v. M'Kenzie* (1896), 23 Ont. App. 167; *M'Cuaig v. Barber* (1898), 29 S. C. R. 126.

(t) (1896), 23 Ont. App. 167.

(u) *Trust and Loan Co. v. M'Kenzie* (1896), 23 Ont. App. 167.

(x) *Aldous v. Hicks* (1891), 21 Ont. 95.

(y) (1898), 29 S. C. R. 126.

(z) *Muttlebury v. Taylor* (1892), 22 Ont. 312, at p. 315.

plaintiffs, to which the husband was a party, but without conveying or joining in the covenants, was given as collateral security for the payment of certain notes made by the husband and wife to secure the husband's indebtedness. Subsequently another mortgage was given by the wife which became vested in the defendants, a bank. Further liabilities were incurred by the husband to the plaintiffs, and payments were made on account, and subsequently the whole indebtedness was adjusted, the plaintiffs taking in payment the notes of the husband alone, maturing at several future dates, in substitution for the original notes, which the plaintiffs agreed to cancel and deliver up. Some time after this the wife executed an agreement recognizing the mortgage to the plaintiffs as existing and as security for a certain sum. Held that the effect of what had taken place was to extinguish the liability on the notes secured by the mortgage to the plaintiffs and the mortgage itself given as collateral security therefor, and that the right to have it discharged enured to the benefit of the holders of the second mortgage, and that such right was not affected by the agreement subsequently entered into between the wife and the plaintiffs (a).

A mortgage of leasehold lands to secure \$5000 made by three trustees and executors under a will recited their appointment and that the moneys were required for the purpose of the estate, the mortgage being under the Short Forms Act and containing the usual covenant for payment by the mortgagors. In 1888, under a provision therefor in the will, a new executor and trustee was appointed, the retiring one of the original three being released and all his interest vested in his successor and those remaining. In 1892, while \$3000 still remained due, the security being greatly diminished in value and worth no more than the amount then due on it, the plaintiffs with a full knowledge of all the facts entered into an agreement under seal with the then executors and trustees for an extension of time for the payment of the principal, which though providing for a reduction of the rate of interest also provided for its being compounded and that the rate was to apply as well before as after maturity. The agreement contained a covenant by the

(a) *The Waterous Engine Works Co. v. Livingstone* (1904), 7 O. L. R. 740.

then executors and trustees to pay the mortgage money and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of other parties in the mortgaged premises, all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved. It was held that the agreement to extend the mortgage was in effect a transaction for a new loan on different and more onerous terms, and that as between the executors and trustees as last constituted and the one who has retired the relationship of principal and surety was created, and by virtue of the agreement, notwithstanding the reservation of remedies, the surety was discharged (*b*). Where mortgagees sold the mortgaged premises without notice to a surety for part of the debt, it was held that they were liable as between themselves, and the surety for the full value for the property (*c*).

The relations which exist among mortgagee, mortgagor, and assignee of the land who have agreed to pay the mortgage are not those which obtain among creditor, surety, and principal debtor (*d*). Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen. So long as the covenant to pay endure, the mortgagor is liable to pay when sued by the mortgagee. The equitable right of the mortgagor is upon payment to get the land back, or to have unimpaired remedies against his assignee if he has sold the land, and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights (*e*).

When land subject to mortgage is sold by the mortgagor and the purchaser assumes and covenants to pay the mortgage the mortgagor does not become a surety to the mortgagee in the

(*b*) *Canada Permanent Savings and Loan Co. v. Ball* (1899), 30 Ont. 557.

(*c*) *Martin v. Hall & Nicholls* (1878), 25 Gr. 471.

(*d*) *Aldous v. Hicks* (1891), 21 O. R. 95, approved.

(*e*) *Matthers v. Halliwell* (1863), 10 Gr. 172, explained.

technical sense, and the doctrines as to the discharge of sureties do not apply to him to their full extent. The mortgagor is liable therefor upon his covenant, notwithstanding a previous extension of time granted by the mortgagee to the purchaser, if when the liability is enforced the right of the mortgagee to redeem is not affected (*f*).

Where on the sale of the equity of redemption an agreement was made by the mortgagee to look to purchaser, it was held that there could be no action on the covenant against the mortgagor (*g*).

If an action on the covenant is brought after foreclosure the foreclosure will be reopened (*h*). If the consideration for a mortgage is clearly illegal no action on the covenant for payment can succeed (*i*).

A mortgagee under an ordinary mortgage may recover possession and lease or sell the lands mortgaged, or he may bring an action on the covenant in the mortgage. Where the mortgage deed contains no covenant for payment an action will not lie as a general rule against the mortgagor unless there is evidence of a debt or loan (*k*). Where the mortgage deed contains a proviso that the mortgage shall be void on payment of the mortgage moneys and also a proviso to sell and eject on default, but does not contain a covenant to pay, the mortgagor is not liable to pay upon mere proof of the mortgage. There must be evidence also of a loan or debt; and a promise to pay in consideration of forbearance to sue would not be binding, although a promise would be binding if made in consideration of forbearance to sell or eject (*l*), and where the mortgage was payable in instalments and one of the payments was made and afterwards the mortgagor promised to pay a further instalment then overdue in consideration

(*f*) *Forster v. Ivey* (1901), 2 O. L. R. 480; *dictum* of Maclellan, J.A., in *Trust and Loan Co. v. McKenzie* (1896), 23 A. R. 167; dissented from *Barber v. McCuaig* (1897-8), 24 A. R. 492; 29 S. C. R. 126; followed *Forster v. Ivey* (1900), 32 O. R. 175; *The Colonial Investment and Loan Company v. King et al* (1902), 5 Terr. L. R. 371.

(*g*) *Cornell v. Honugan*, 2 O. W. R. 4 and 510.

(*h*) *Colonial Investment and Loan Co. v. King*, 23 Occ. N. 126; 5 Terr. L. R. 371.

(*i*) *Mann v. Holton* (1904), 3 O. W. R. 804.

(*k*) *Hall v. Morley* (1853), 8 U. C. R. 584.

(*l*) *Jackson v. Yeomans* (1876), 39 U. C. R. 280.

of the mortgagee forbearing to take any proceedings on the mortgage for two months it was held that the mortgagee could not recover; for the promise which was verbal was a contract for an interest in lands within s. 4 of the Statute of Frauds; and if the transaction amounted to a lease it was not binding unless in writing under s. 2 of the statute (*m*). The execution of a mortgage containing an acknowledgment of the receipt of mortgage money, but no personal covenant for repayment does not in itself afford conclusive evidence of a debt, so as to enable a mortgagee or his assignees to maintain an action for its recovery (*n*). It was held that where no money was advanced by the mortgagee, but the mortgage was given for a debt due by the mortgagor to the mortgagee who, in consideration of getting the mortgage, agreed to release the mortgagor from all personal liability, the plaintiffs, who were assignees of the mortgage, were not entitled to recover (*o*). It is usual to insert in mortgages the form of covenant adopted in Ontario by the Act respecting short forms of mortgages (*p*).

A mortgagor may by his covenant restrict his liability as to the amount and as to the terms on which the mortgage may be enforced (*q*). In a mortgage for \$3250, which contained the usual printed short form covenant for payment, the following words were added in writing to the covenant: "But before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged and the mortgagor shall then be liable only to the amount of \$600 or such lesser sum as will, with the net proceeds from the lands, make the \$3250 and interest." The last clause in the mortgage, also added in writing, provided that "in no event shall the personal liability of the mortgagor on his covenant exceed \$600." It was held that the mortgagor was not to be subject to any liability on the covenant until the lands were realized, and the result showed a deficiency, and then only to the extent of \$600 (*r*).

(*m*) *Jackson v. Yeomans* (1876), 39 U. C. R. 280.

(*n*) *London Loan Co. v. Smyth* (1882), 32 U. C. C. P. 530.

(*o*) *Ibid.*

(*p*) R. S. O. (1897), c. 126, Schedule B, clause 4; R. S. B. C. (1897), c. 142; R. S. Man. (1902), c. 157.

(*q*) *Wilson v. Fleming* (1893), 24 Ont. 388.

(*r*) *Ibid.*

In Ontario under s. 5 of the Act respecting Mortgages of Real Estate (s) a covenant for payment of the mortgage money and interest by the person who conveys as beneficial owner is implied in all mortgages made after the 1st day of July, 1886. The right of a mortgagee to sue for principal or interest in the Division Courts is governed by s. 79 of the Division Courts Act (t). The mortgagee cannot sue in the Division Court for the amount of an instalment of interest upon a mortgage, the amount of the instalment being within the jurisdiction of the Division Court when other instalments are due, which bring the whole amount beyond the jurisdiction (u).

Pringle brought action to recover \$3808.32 under a covenant in a mortgage which had been assigned to him by Smith. The writ and statement of claim were amended under order of master in chambers by adding Smith as a party plaintiff with apt words, the covenant having been given to him. Defendant pleaded want of notice of assignment and lack of registration as required by Registry Act. Judgment was given for plaintiff (x).

As a general rule only parties to a contract may sue or be sued thereon. But the benefit or the burden of the covenant may devolve on others by assignment or by operation of law.

Where there is a debt due from the mortgagor to the mortgagee or a loan for which the mortgage has been given, the mortgagee, during his lifetime and while he is the holder of the security, may maintain an action whether there is a covenant for payment or not; and where there are two or more mortgages the survivor or survivors of them may sue in like manner, for he or they are entitled by law to receive the money and give discharges for the same (y).

The executors or administrators of a deceased mortgagee who died entitled to the mortgage money may also sue to

(s) R. S. O. (1897), c. 121.

(t) R. S. O. (1897), c. 60.

(u) *Re Real Estate Loan Co. v. Guardhouse* (1898), 29 Ont. 602; following *Re Clarke v. Barber* (1894), 26 Ont. 47.

(x) *Pringle et al v. Hutson* (1909), 14 O. W. R. 1083.

(y) R. S. O. (1897), c. 121, s. 13.

recover it as a debt and the remedies for it devolve upon them by law, Devolution of Estates Act (z). Although the heirs of the mortgagee are named in the statutory covenant for payment, the personal representatives will not thereby be deprived of their ordinary right to sue for the moneys in their own names (a). It has been held that two of three executors may give a valid discharge (b).

In a like manner the executors or administrators of the last survivor of the two or more joint mortgagees may recover the mortgage moneys by action as they are the persons entitled by law to receive the same. This provision, however, applies only to mortgages made after the first day of July, 1886, and only if and so far as a contrary intention is not expressed in the mortgage (c). The assignee of the mortgage security also may sue on the covenant in his own name. The Ontario Judicature Act, R. S. O. (1897), ch. 51, s. 58, sub-s. 5. This section applies to absolute assignments made after the thirty-first day of December, 1897. Express notice in writing to the debtor is essential to the validity of the assignment. In a suit brought by the executors of a deceased mortgagee to foreclose it was held that the heirs of the deceased mortgagee or the persons beneficially interested under his will were not necessary parties (d). In Ontario under the Execution Act (e), a sheriff who has taken a mortgage in execution on behalf of a creditor of the mortgagee may bring an action on such mortgage to recover the mortgage money.

If the covenant is a joint covenant the action must be brought against all the covenantors if living. In case any one or more contractors, obligors or partners die the person interested in the contract, obligation or promise entered into by such joint contractors, obligors or partners may proceed by action against the representatives of the deceased covenantor in the same manner as if the covenant had been joint and

(z) R. S. O. (1897), c. 127, s. 4.

(a) Leith's Real Property Statutes, p. 420.

(b) *Ex parte Johnson* (1875), 6 P. R. 225.

(c) R. S. O. (1897), c. 121, s. 13.

(d) *Lawrence v. Humphries* (1865), 11 Gr. 209.

(e) R. S. O. (1897), c. 77, s. 18.

several and without joining the other covenantors, although they may be living (*f*).

A covenant by a corporation sole, described in his corporate capacity, expressed to be on behalf of himself, his heirs, executor, and administrator, will not bind his successors in office (*g*).

The duly appointed trustees of a religious congregation, to whom by that description the site for a church has been conveyed, and who by that description give to the vendor to secure part of the purchase money a mortgage with the ordinary covenant for payment, are a corporation and are not personally liable upon the mortgage although it is signed and sealed by them individually (*h*). As a general rule a trustee is not personally liable to repay a mortgage debt. Where a person holding land as a trustee at the request of the beneficial owners and without any consideration to him therefor or intention to become personally liable executed a mortgage on land for the benefit of the owners, and the mortgage deed contained without his knowledge a covenant to pay the mortgage debt, it was held that the covenant was not enforceable against the mortgagor personally even by the assignee of the mortgage for value without notice, and that his remedy was restricted to foreclosure proceedings against the lands (*i*). If the mortgagor is a married woman and the mortgage deed contains a covenant by her to pay the principal and interest she is not thereby made personally liable, but the covenant operates as a contract binding upon her general separate estate in the manner provided by the Married Women's Property Act (*k*). A married woman is not liable on the covenant for payment unless it be shown that the property mortgaged was her separate property. Thus where the married woman was merely a trustee for her husband of property purchased by him and conveyed to her, and she joined with her husband in creating a mortgage upon it, she was held not liable on the covenant for payment although the mortgagee

(*f*) R. S. O. (1897), c. 129, s. 15.

(*g*) *Paris v. Bishop of New Westminster* (1897), 5 B. C. Reports 450.

(*h*) *Beaty v. Gregory* (1897), 24 Ont. App. 325, R. S. O. (1897), c. 307.

(*i*) *Patterson v. McLean* (1891), 21 Ont. 221.

(*k*) R. S. O. (1897), c. 163.

had no knowledge of her position (*l*). The burden of the covenant to pay the mortgage money does not run with the land. Although a purchaser from the mortgagor of the equity of redemption covenants with him to pay off the mortgage debt, this affords no ground owing to the want of privity for the mortgagee proceeding against the purchaser either at law or in equity to compel him to perform his covenant (*m*). Although the purchaser of the equity of redemption is not directly liable to the mortgagee to pay the mortgage debt the rule is clear that he is bound as between himself and his assignor (the mortgagor) to pay off the incumbrance, and there is an implied obligation on his part to indemnify the mortgagor against the mortgage debt and he may be required to give a covenant for such indemnity (*n*). In the North-West Territories (*o*) there is an implied covenant in every instrument transferring land subject to a mortgage that the purchaser will pay the mortgage moneys and indemnify his grantor. In Manitoba a similar provision is in force (*p*). A married woman, however, who purchases mortgaged lands is not under any obligation to indemnify her grantor unless she expressly undertakes to do so (*q*). But where mortgage lands are conveyed to a married woman and the conveyance although not executed by her contains a recital that she shall assume and pay off the mortgage debt, in such case if she takes possession and enjoys the benefits without disclaiming or taking steps to free herself from the burden of the title it must be considered that in assenting to take under the deed she will be bound to perform the obligation (*r*). There may, however, be an express agreement between the mortgagor and the purchaser of the equity of redemption

(*l*) *Gorden v. Warren* (1897), 24 Ont. App. 44.

(*m*) *Clarkson v. Scott* (1878), 25 Gr. 373; *Frontenac Loan and Investment Society v. Hysop* (1892), 21 Ont. 577; *Canada Landed and National Investment Co. v. Shaver* (1895), 22 Ont. App. 377.

(*n*) *Thomson v. Wilkes* (1856), 5 Gr. 594; *Canovan v. Meek* (1883), 2 Ont. 636; *Boyd v. Johnston* (1890), 19 Ont. 598.

(*o*) R. S. C. (1906), c. 110, s. 69.

(*p*) R. S. Man. (1902), c. 133, s. 89; and *Reeves v. Kouschur* (1908), Sask., 8 W. L. R. 346.

(*q*) *M'Michael v. Wilkie* (1891), 18 Ont. App. 464.

(*r*) *Small v. Thompson* (1897), 28 S. C. R. 219.

that the latter shall not be liable for such indemnity and parol evidence of such an agreement is admissible (*s*). The obligation of a purchaser of mortgaged land to indemnify the mortgagor against the mortgage debt may be assigned by the latter to the mortgagee, who may maintain an action thereon against the purchaser for recovery of the mortgage money (*t*). Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities or rights arising either under express contract or upon equitable principles entitling the trustee to indemnity from his *cestui que* trust (*u*).

In *Beer v. Williams* (1910), 15 O. W. R. 868, an action was brought against an heir in possession of other property for balance of mortgage money and dismissed.

(*s*) *British Canadian Loan Co. v. Lear* (1893), 23 Ont. 664.

(*t*) *British Canadian Loan Co. v. Lear* (1893), 23 Ont. 664; *Campbell v. Morrison* (1897), 24 Ont. App. 224; affirmed in the Supreme Court of Canada *sub. nom. Maloney v. Campbell*, 28 S. C. R. 228.

(*u*) *Williams v. Balfour* (1890), 18 S. C. R. 472.

CHAPTER VI.

Of the Appointment of a Receiver ^(a).

	PARAGRAPHS	Paragraph
Section I.—Of the Appointment of a Receiver by the Mortgagee	814—822	814
„ II.—Of the Judicial Appointment of a Receiver ..	823—869	
SUB-SECT. (1).—THE NATURE OF THE APPOINTMENT ..	823—827	
„ (2).—IN WHOSE FAVOUR AND AGAINST WHOM THE RECEIVER MAY BE APPOINTED ..	828—839	
„ (3).—OF WHAT PROPERTY A RECEIVER MAY BE APPOINTED	840—847	
„ (4).—AT WHAT STAGE OF THE ACTION THE RECEIVER MAY BE APPOINTED ..	848—849	
„ (5).—THE AUTHORITY OF THE RECEIVER ..	850—861	
„ (6).—HIS RIGHT TO APPLY TO THE COURT ..	862	
„ (7).—HIS POSSESSION	863—869	

SECTION I.

Of the Appointment of a Receiver by the Mortgagee.

<i>Express power in the mortgage and statutory power where instrument executed before 1882</i>	<i>814</i>
<i>Existing statutory power where mortgage executed since 1881</i>	<i>815</i>
<i>Statutory receiver is the mortgagor's agent</i>	<i>816</i>
<i>Powers</i>	<i>817</i>
<i>Removal of statutory receiver</i>	<i>818</i>
<i>Remuneration</i>	<i>819</i>
<i>Duties</i>	<i>820</i>
<i>Receiver appointed by both parties is mortgagor's agent</i>	<i>821</i>
<i>Interference with receiver by mortgagor may be restrained</i>	<i>822</i>

814. The security sometimes contains an appointment of, or a ^{Express} power for the mortgagee to appoint, a person to be receiver or ^{power in the} receiver and manager of the mortgaged property in order to secure ^{mortgage and} to the mortgagee the payment of his interest out of the rents and ^{statutory} power where ^{instrument}

(a) The consideration of the persons who may be appointed receivers, the allowances to receivers, their liabilities, the passing of their accounts, and payment of their balances and final discharge, being matters common to all receiverships, on which books of practice afford all necessary information, are not treated of here.

Paragraphs
814—815

executed
before 1882.

profits. Under 23 & 24 Vict. c. 145, a power to appoint or to obtain the appointment of a receiver of the rents and profits of the whole or any part of hereditaments of any tenure, upon which any principal money was secured or charged by deed, or over any interest therein, might be exercised (unless the power were negatived by express declaration in the security, and subject to any variations or limitations therein contained) by the person to whom such money should for the time being be payable, his executors, administrators or assigns, at any time after the expiration of one year from the time when such principal money should have become payable according to the terms of the deed, or after any interest thereon should have been in arrear for six months, or after any omission to pay any premiums, or any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge.

The clauses of the Act which conferred this power (b) have been repealed by the Conveyancing and Law of Property Act, 1881, c. 41, s. 71; with the proviso, that the repeal shall not affect the validity or invalidity, or any *operation, effect, or consequence* of any instrument executed or made, or of anything done or suffered before the commencement of the Act (December 31st, 1881), or any action, proceeding or thing then pending or uncompleted.

By the words, “saving the operation, effect or consequence,” of instruments executed before the commencement of the repealing Act, it was intended to preserve not only all the effects and consequences which actually had arisen under a previously-executed instrument, at the passing of the repealing Act, but also such as would have arisen under it if the repealing Act had not passed: and thus, amongst other things, to preserve the right to appoint a receiver (c).

Existing
statutory
power where
mortgage
executed
since 1881.

815. Under the Act of 1881 (d), a mortgagee or person deriving title under the original mortgagee, when the mortgage is made by deed, may appoint a receiver of the income of the mortgaged property, or of any part thereof, when he is entitled to exercise the power of sale given by the Act, that is to say, when—

- (i.) Notice requiring payment thereof has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or,
- (ii.) Some interest under the mortgage is in arrear, and unpaid for two months after becoming due; or,

(b) 23 & 24 Vict. c. 145, ss. 11—30.

(c) See *Re Solomon and Meagher's Contract*, 40 Ch. D. 508, and *Re Boucherett, Barne v. Erskine*, [1908] 1 Ch. 181.

(d) Sects. 19 (1) (iii.), 20, 24.

(iii.) There has been a breach of some provision contained in the mortgage deed or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon. Paragraphs
815—820

A mortgagee (e) entitled to appoint a receiver under the Act, may by writing under his hand appoint such person as he thinks fit to be receiver.

816. The receiver shall be deemed to be the agent of the mortgagor (i.e., the person entitled to redeem), who shall be solely responsible for the receiver's acts or defaults, unless otherwise provided for in the mortgage deed. Statutory
receiver is
the mort-
gagor's agent.

817. The receiver shall have power to demand, recover, and give effectual receipts for all the income of the property of which he is appointed receiver, by action, distress or otherwise, in the name either of the mortgagor or person entitled to redeem (f), or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of. A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act. Powers of
receiver.

818. The receiver may be removed, and a new receiver may be appointed from time to time by the mortgagee by writing under his hand. Removal of
statutory
receiver.

819. The receiver may retain out of any money received by him for his remuneration and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding 5 per cent. on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of 5 per cent. on that gross amount, or at such higher rate as the court thinks fit to allow, on application made by him for that purpose. Remunera-
tion.

820. The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature. And (subject to any modifications contained in the mortgage deed (g)) shall apply all the money received by him (i) in discharge of all rents, taxes, rates and Duties.

(e) Conveyancing and Law of Property Act, 1881, c. 41, s. 24. It seems that interest cannot be said to be in arrear where the mortgagee is in possession and the rents are sufficient to keep the interest down: See *Wrigley v. Gill*, [1906] 1 Ch. at p. 172.

(f) Even in the name of the infant heir of the mortgagor: *Fairholme v. Kennedy*, 24 L. R. Ir. 498.

(g) *Re Hale, Lilley v. Foad*, [1899] 2 Ch. 107.

Paragraphs
820—822

outgoings whatever affecting the mortgaged property; (ii) in keeping down all annual sums or other payments, and the interest on all principal sums having priority to the mortgage, in right whereof he is receiver; (iii) in payment of his commission, and of the insurance premiums, if any, properly payable under the mortgage deed or under the Act, and the costs of executing necessary or proper repairs directed in writing by the mortgagee (*h*); (iv) in payment of the interest accruing in respect of any principal money due under the mortgage; and shall pay the residue of the money received by him to the person who but for the possession of the receiver would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled thereto.

Receiver appointed by both parties is mortgagor's agent.

821. The receiver is the agent of the mortgagor (*i*), as well where he is appointed by the parties as under the Act; and in the former case his powers are usually clearly defined by the instrument of appointment. And where a person is appointed to receive the profits of the estate on behalf of the mortgagee, and the mortgagor is afterwards allowed to receive them, the mortgagee's rights are not affected, except as to later incumbrancers of whose claims he had notice (*j*). The powers of the receiver are not revoked by the death of the mortgagor (*k*). Nor does the appointment bar the right of the creditor to sue for the debt (*l*).

Interference with receiver by mortgagor may be restrained.

822. A receiver appointed under the Act to receive rents must not be interfered with by the mortgagor, and any attempt to do so (*ex. gr.*, by distraining on the tenants) will be restrained (*m*).

SECTION II.

Of the Judicial Appointment of a Receiver.

SUB-SECTION (1).—Of the Nature of the Appointment.

	PARAGRAPH
Power of court to appoint receiver	823
Appointment once made will not be lightly interfered with	824
Security required from receiver	825
Receiver is protector of property for all parties	826
Even in administration action receiver protects incumbrancers	827

(*h*) See *White v. Metcalf*, [1903] 2 Ch. 567, where KEKEWICH, J., held that the direction in writing of the mortgagee is essential, and that even then the receiver's power of expending money on repairs is confined to rents actually received.

(*i*) *Jefferys v. Dickson*, L. R. 1 Ch. 183; 2 Dav. Conv. 566, ed. 2; *Law v. Glenn*, per ROLT, L.J., L. R. 2 Ch. at p. 641. And see *Exp. Warren, Re Joyce*, L. R. 10 Ch. 222.

(*j*) *Juggeewandas Keeka Shah v. Ramdas Brigbookamdas*, 2 Moo. Ind. App. 487.

(*k*) *Re Hale, Lilley v. Foad*, *supra*.

(*l*) *Lynde v. Waithman*, [1895] 2 Q. B. 180.

(*m*) *Bayly v. Went*, 51 L. T. 764.

SUB-SECTION (2).—*In whose favour and against whom the Receiver may be appointed.*

	PARAGRAPH
<i>Formerly not appointed at suit of legal mortgage</i>	828
<i>Since Judicature Act appointed whether mortgage be legal or equitable ..</i>	829
<i>On application of puisne mortgagee</i>	830
<i>Receivers appointed on application of puisne mortgagees are so appointed without prejudice to rights of prior legal mortgagees</i>	831
<i>Incumbrancer who is also tenant</i>	832
<i>Prior mortgagee must swear that something definite is due to him</i>	833
<i>Receiver appointed without prejudice to prior rights even where prior incumbrancers not in possession</i>	834
<i>Discharge of receiver appointed per incuriam over head of prior mortgagee</i>	835
<i>Receiver appointed against the legal estate</i>	836
<i>Receiver not appointed to supersede trustees for mortgagees in absence of misconduct</i>	837
<i>Appointed in foreclosure suit by equitable mortgagee or in redemption suit</i>	838
<i>Other cases in which receiver appointed</i>	839

SUB-SECTION (3).—*Of what property a Receiver may be appointed.*

<i>Generally over all property on which execution may be levied</i>	840
<i>Receivers of revenues of public undertakings but not managers appointed at suit of debenture holders</i>	841
<i>Receivers not appointed over borough rates</i>	842
<i>Receivers of fellowships, canonries, etc.</i>	843
<i>No receiver of salaries payable for performance of public duties</i>	844
<i>No receiver of ecclesiastical benefice</i>	845
<i>Receiver and manager of mortgaged mines</i>	846
<i>Receiver appointed of foreign or colonial lands</i>	847

SUB-SECTION (4).—*At what stage of the action the appointment may be made.*

<i>Immediately after writ issued if necessary</i>	848
<i>Receiver may be appointed at or after hearing although not claimed by writ</i>	849

SUB-SECTION (5).—*The authority of the Receiver.*

<i>Cannot in general incur expense or liability without sanction of court ..</i>	850
<i>Receiver makes expenditure without leave at his peril</i>	851
<i>Court may sanction expenditure in urgent cases although all parties not before it</i>	852
<i>How far receiver may distrain without leave</i>	853
<i>Persons in possession refusing to give it to receiver</i>	854
<i>Should not let property without leave</i>	855
<i>Proceedings by stranger to action against receiver</i>	856
<i>Lease by tenant for life after appointment of receiver</i>	857
<i>Receiver entitled to rents in arrear</i>	858
<i>If defendant interferes with rents he may be attached</i>	859
<i>To whom rents collected by receiver belong on dismissal of foreclosure suit</i>	860
<i>Duty of receiver where owner of equity of redemption is an infant</i>	861

SUB-SECTION (6).—*Of the Receiver's right to apply to the Court.*

<i>Receiver applies to court through the plaintiff</i>	862
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Paragraphs
823—825

SUB-SECTION (7).—Of the Receiver's possession.

	PARAGRAPH
<i>Interference with receiver's possession a contempt of court</i>	863
<i>Adverse claimant cannot prosecute his claim without leave</i>	864
<i>The order appointing receiver should specify the property</i>	865
<i>Sheriff seizing property in receiver's possession</i>	866
<i>Court uses power of committing for contempt sparingly</i>	867
<i>Leave given to a person who claims adversely to receiver to come in and prove his interest</i>	868
<i>How application for leave made</i>	869

SUB-SECTION (1).—Of the nature of the Appointment.

Power of
court to
appoint
receiver.

823. Under certain circumstances, and on the application of some or one of the parties interested in the encumbered estate, but not of a stranger (*n*), the court will appoint a receiver, who shall get in and take charge of the outstanding parts, and rents and profits, and see to the management of the estate, applying the moneys received according to the directions of the court, and accounting to the court for such application.

The application for a receiver may be made to the court or a judge by any party, and if made by the plaintiff may be *ex parte* or with notice; and if by any other party then on notice to the plaintiff and at any time after appearance by the applicant (*o*).

Appointment
once made
will not be
lightly
interfered
with.

824. The court is unwilling to disturb an appointment which has once been made, and will not do so unless the person chosen be shown to be unfit, or upon a mere question of the relative fitness of the competitors for the office (*p*).

Security
required from
receiver.

825. The receiver is required to give security (by himself and two or more sureties (*q*)) duly to account for what he shall receive on account of the rents and profits, for the receipt of which he is to be appointed, or to be answerable for what he shall receive in respect of the personal estate which he is to get in, and to account for and pay the same respectively as the court shall direct; and a different mode of giving security, as, for instance, by the assignment of a mortgage, is improper (*r*). The security is generally for double the annual rental to be got in (*s*).

The court will not generally dispense with sureties, even by consent of the parties interested (*t*). But if they, being competent

(*n*) *Att.-Gen. v. Day*, 2 Mad. 246.
(*o*) Judicature Act, 1875, s. 25 (8); Rules, 1883, Ord. L. r: 6.
(*p*) *Creuze v. Bishop of London*, 2 Bro. C. C. 253; *Thomas v. Dawkin*. 1 Ves. Jun. 452; *Bowersbank v. Colasseau*, 3 Ves. Jun. 164; *Anon.*, 3 Ves. Jun. 515; *Tharpe v. Tharpe*, 12 Ves. 317; *Wynne v. Lord Newborough*, 15 Ves. 283.
(*q*) Rules, 1883, Ord. L. r: 16.
(*r*) *Mead v. Lord Orrery*, 3 Atk. 235.
(*s*) Seton, ed. 6, 654.
(*t*) *Manners v. Furze*, 11 Beav. 30; *Tylee v. Tylee*, 17 Beav. 583.

to consent, will appoint a receiver of their own authority, the court will allow him to act without finding sureties (*u*). Paragraphs
825—827

The court also sometimes dispenses with security, where no salary is given to the receiver (*x*).

The receiver is not legally clothed with, or able to perform the duties of his office until it has been certified that his security has been completed ; and until that event no contempt is committed by interfering with the property, so far as his right of possession is concerned, though the property be bound by an injunction operating only as between the parties to the action (*y*) (131). But this does not apply where *per incuriam* or otherwise the order appointing him is silent as to the security (*z*).

826. The appointment, which is a matter of discretion to be governed by the whole circumstances of the case (*a*), is made in the first place for the protection of the estate ; the court, upon the application, will not decide, and the appointment does not affect, the ultimate rights of the parties to the suit (*b*). Nor does it affect the operation of the Statute of Limitations : for otherwise minors would suffer by the putting of the property under the protection of the court (*c*). Receiver is
protector of
property for
all parties.

827. Even where a receiver is appointed in an administration action, and not in an action at the suit of the mortgagee, the appointment is also for the benefit of the incumbrancers (*d*), that they may not be injured by the act of the court in taking possession of the fund to which they were entitled to resort for payment of their interest. It is not, however, absolutely for their benefit without their own interference, but only so far as it is expressed to be so, and as they choose to avail themselves of it (*e*). Therefore, if an incumbrancer omit to apply for rents, which have been paid into court by the receiver during the minority of an infant tenant in tail, the latter may take them when he comes of age, though the incumbrancer's interest be in arrear ; for by his omission to apply, it is presumed that he was satisfied with his security, both for principal and interest : and as he may suffer the interest to run in arrear when the estate is not in the possession of the court, so it Even in
administra-
tion action
receiver
protects in-
cumbrancers.

(*u*) *Ridout v. Earl of Plymouth*, 1 Dick. 68 ; *Carlisle v. Carlisle* (1761), cited there ; *Manners v. Furze*, 11 Beav. 30.

(*x*) *Gardner v. Blane*, 1 Hare, 381 ; *Bainbrigge v. Blair*, 3 Beav. 421.

(*y*) *Defries v. Creed*, 34 L. J. Ch. 607 ; *Edwards v. Edwards*, 2 Ch. D. 291.

(*z*) *Morrison v. Skerne Ironworks Co.*, 60 L. T. 588.

(*a*) *Owen v. Homan*, 3 Mac. & G. at p. 412, *per* Lord TRURO ; *Greville v. Fleming*, 2 Jo. & Lat. 339.

(*b*) *Skip v. Harwood*, 3 Atk. 564 ; *Blakeney v. Dufaur*, 15 Beav. 40.

(*c*) *Per* Lord HARDWICKE, 2 Atk. 15 ; *Harrison v. Duignan*, 2 Dru. & War. 295 ; *Hunt v. Bateman*, 10 Ir. Eq. R. 360.

(*d*) *Bainbrigge v. Blair*, 3 Beav. 421.

(*e*) *Gresley v. Adderley*, 1 Swans. 573 ; *Bertie v. Lord Abingdon*, 3 Mer. 560.

Paragraphs
827—829

may be when there is a receiver. The court neither forces payment upon him, nor sets apart any part of the profits to answer unpaid interest. In like manner, if the mortgagee of a term have suffered the receiver to pay the surplus rents into court, and the term expire, the heir will have the benefit (*f*); the mortgagee being in the same position as the mortgagee in fee, who is entitled only to such rents as accrue during his possession, which it seems may date from the time of his application for the discharge of the receiver (*g*).

SUB-SECTION (2).—*In whose favour and against whom the Receiver may be appointed.*

Formerly not
appointed at
suit of legal
mortgagee.

828. Before the passing of the Judicature Acts, the general right of the legal mortgagee against the income of the mortgaged property was to take possession, and not to come for a receiver, which the court would not grant him when he was out of possession (*h*). And though the exercise of the legal right might be obstructed by difficulties, it did not follow that the equitable remedy would be granted (*i*). Upon the same principle a receiver was denied to an incumbrancer in whom, or in whose trustee, statutory or other powers of entry and distress were vested, unless, either from the insufficiency of the rents, the greatness of the arrears, or other circumstances, the powers would not give a sufficient remedy (*k*); or where, as in a suit on behalf of grantees of rent-charges with such powers, it was necessary, in order to obtain tenants, to appoint a receiver for protection against the powers (*l*). The court, however, would appoint a receiver under the old practice (*m*), in favour of a legal mortgagee to avoid danger to the security, or where there was difficulty in exercising the usual remedy (**836**).

Since Judi-
cature Act
appointed
whether
mortgage be
legal or
equitable.

829. Since the Judicature Act, 1873 (s. 25 (8) of which enables the court to appoint a receiver when it shall appear to be just or convenient), such appointments are as freely made, if the appointment of a receiver be desirable, as in cases in which the mortgagee has only an equitable interest (*n*). Moreover, the court

(*f*) *Gresley v. Adderley*, 1 Swans. 573.

(*g*) *Thomas v. Brigstocke*, 4 Russ. 64.

(*h*) *Berney v. Sewell*, 1 Jac. & W. 647; *Sturch v. Young*, 5 Beav. 557; *Cox v. Champneys*, Jac. 576; *Drought v. Purceval*, 2 Mol. 502.

(*i*) *Cremen v. Hawkes*, 2 Jo. & Lat. 674.

(*k*) *Champernoon v. Gubbs*, 2 Vern. 382; *Buxton v. Monkhouse*, G. Coop. 41; *Cupit v. Jackson*, 13 Pr. 721; *Sollory v. Leaver*, L. R. 9 Eq. 22; *Kelsey v. Kelsey*, L. R. 17 Eq. 495; but see *Foster v. Foster*, 2 Vern. 386; *Manly v. Hawkins*, 1 Dru. & Wal. 363.

(*l*) *White v. Smale*, 22 Beav. 72.

(*m*) *Ackland v. Gravener*, 31 Beav. 482; *Kelly v. Staunton*, 1 Hog. 393.

(*n*) *Pease v. Fletcher*, 1 Ch. D. 273; *Truman v. Redgrave*, 18 Ch. D. 547; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.

will make the appointment, even although the mortgagee might himself appoint a receiver out of court, under the Conveyancing and Law of Property Act, 1881; and where an action is pending, a judicial appointment is preferable (*o*). The appointment *may* be made, even where the plaintiff is mortgagee in possession, and has surplus rents (*p*); but the court will not, as a rule, assist a mortgagee in possession to get rid of his liabilities by appointing a receiver (*q*).

Paragraphs
829—831

830. A *puisne* mortgagee, or other equitable incumbrancer, is generally entitled to a receiver (*r*), provided the court be satisfied of the existence of the equitable right in the applicant (*s*). And the appointment may be made for the purpose of keeping down the interest, even though the applicant be unable at the time to enforce the usual mortgagee's remedies; as if (*t*) he have covenanted not to call in the mortgage debt during a certain time; and though by the transaction itself the security gave the creditor no right to be considered as a mortgagee of the estate, but only made the rents a fund for payment of interest and of the premiums upon a policy of insurance, out of the produce of which the principal was to be paid (*u*).

On applica-
tion of *puisne*
mortgagee.

831. This right of the equitable incumbrancer is, however, subject to the general principle, that its exercise must be without prejudice to the prior legal incumbrancer. Therefore, the appointment of a receiver will be without prejudice to the right of any prior incumbrancer; and if any prior incumbrancer is in possession, then without prejudice to such possession (*x*). And if the prior incumbrancer subsequently notifies the tenants that they must pay their rents to him they will be justified in doing so (*y*). Moreover, when possession is taken by a prior incumbrancer, the balance which may be found due from the receiver upon passing his accounts, will be ordered to be paid to such prior incumbrancer (**622**).

Receivers
appointed on
application
of *puisne*
mortgagees
are so
appointed
without
prejudice to
rights of
prior legal
mortgagees.

It is only in favour of prior legal incumbrancers that this principle is applied. It will not enable a third mortgagee who, having lent his money with notice of the second mortgage (**1153**), has taken possession, and bought in the first, to hold until payment

(*o*) *Tillett v. Nixon*, 25 Ch. D. 238.

(*p*) *Mason v. Westoby*, 32 Ch. D. 206.

(*q*) *Re Prytherch, Prytherch v. Williams*, 42 Ch. D. 590.

(*r*) *Colman v. Duke of St. Albans*, 3 Ves. Jun. 25; *Berney v. Sewell*, 1 Jac. & W. 647; *Dalmer v. Dashwood*, 2 Cox, 378; *Anderson v. Kemshead*, 16 Beav. 329.

(*s*) *Davis v. Duke of Marlborough*, 2 Swans. at p. 138; *Greville v. Fleming*, 2 Jo. & Lat. 339. The possession of deeds under circumstances consistent with a deposit by way of security raises a *prima facie* case for the appointment of a receiver on an interlocutory application (*Bodger v. Bodger*, 11 W. R. 160).

(*t*) *Burrowes v. Molloy*, 2 Jo. & Lat. 521.

(*u*) *Taylor v. Emerson*, 4 Dru. & War. 117.

(*x*) *Berney v. Sewell*, 1 Jac. & W. 647; *Wells v. Kilpin*, L. R. 18 Eq. 298.

(*y*) *Underhay v. Read*, 20 Q. B. D. 209.

Paragraphs
831—833

of his own debt, as well as of that which is due from the first security (z); though it is presumed that a good right to tack would entitle him to hold in such a case against an equitable mortgagee's right to a receiver.

But it has been held to apply (a) in favour of persons in possession entitled to prior charges on the estate, though they had applied part of the rents in payment of interest due on part of the prior charges, which, having been paid off by the tenant for life, had been kept alive and assigned for his benefit; it being the proper course, as between the owners of the life estate and of the inheritance, to keep down such interest out of the rents, and not to treat the surplus rents, after payment of the interest of the unpaid part of the principal, as applicable to the discharge of such unpaid principal.

Incum-
brancer who
is also
tenant.

832. An incumbrancer who is in possession, not in that character, but as tenant, cannot set up his possession as tenant as a reason against the appointment of a receiver (b).

Prior
mortgagee
must swear
that some-
thing definite
is due to him.

833. The prior mortgagee, in order to save his possession, must be able to swear that something (however small, it seems, may be the amount) (c) is due to him upon his security. If he will do so, no receiver will be appointed against him, and the only course is to pay him off according to his own statement of his debt (d).

But if he refuse to accept what is due, or confess that he is paid off, or if he will not swear that something is due, the court will appoint a receiver (e); and it being the mortgagee's business so to keep his accounts, that he may know whether anything is due, the incomplete state of his accounts will not help him, though time may be given to make an affidavit of the debt (f). It has been intimated (g) that, where neither party can ascertain what is due, by reason of the negligent mode of keeping the accounts, the court may assume that nothing is due.

The mortgagee, it seems, must also swear that some definite sum is due. It is not enough (h) for him to state, in general terms, his belief that when the accounts are taken some particular sum, and parts of other sums, will be found due; without supporting the statement by any accounts, which will serve to test its truth.

(z) *Hiles v. Moore*, 15 Beav. 175.

(a) *Faulkner v. Daniel*, 3 Hare, 204, n.

(b) *Archdeacon v. Bowes*, 3 Anst. 752.

(c) *Chambers v. Goldwin* (5 Ves. 834; 9 Ves. 254) cited in *Quarrell v. Beckford*, 13 Ves. 378; *Quarrell v. Beckford*, 13 Ves. 377; and cited in *Berney v. Sewell*, 1 Jac. & W. 649.

(d) *Berney v. Sewell*, 1 Jac. & W. 647; *Rowe v. Wood*, 2 Jac. & W. 553.

(e) *Berney v. Sewell*, *supra*; *Chambers v. Goldwin*, *supra*.

(f) *Codrington v. Parker*, 16 Ves. 469; *Hiles v. Moore*, 15 Beav. 175.

(g) *Codrington v. Parker*, *supra*.

(h) *Hiles v. Moore*, *supra*.

Where there was a direct statement in the mortgagee's answer, that some definite sum was due, the court would not try the truth of the statement by affidavits against the answer (*i*).

834. The receiver will be appointed without prejudice to the rights of the prior legal owner (*k*), where he refuses to take or is otherwise out of possession. And so, if a receiver be sought by one whose security is subject to prior equitable estates, the court will appoint a receiver, not disturbing the prior equities, but directing that the priorities of the several incumbrancers be ascertained (*l*).

835. Where the receiver has been appointed in the absence of the prior mortgagee in a suit, to which he is a party, he may have the receiver discharged, and an order for possession, when he has been found to be first incumbrancer, and has completed his title to possession (*m*). If he be not a party he should sue for foreclosure and possession. No condition will be imposed upon him for payment of any part of the costs which have been incurred in defending the estate against adverse claimants, though the proceedings were beneficial to him, if he merely acquiesced, but took no part in such proceedings (*n*).

836. Even before the Judicature Acts there were many cases in which a receiver would be appointed, against the legal estate; but in which the court expected the plaintiff to proceed with the most complete and honest diligence to obtain a decree (*o*). The legal mortgagee in possession, whose security was subject to equitable interests, which he refused to satisfy, might be subjected to a receiver (*p*). And so might a legal owner, claiming under a title which, although not yet set aside, lay under strong suspicion of fraud (*q*): but not where the right was only doubtful, the legal estate having been obtained without fraud, and the rents and profits not being alleged to be in danger (*r*). For the court (*s*) always appointed a receiver against the legal title with reluctance; compelled by judicial necessity, the effect of fraud clearly proved, and imminent danger if the intermediate possession should not be taken under the care of the court.

(*i*) *Rowe v. Wood*, 2 Jac. & W. 553.

(*k*) *Davis v. Duke of Marlborough*, 2 Swans. at p. 138; *Berney v. Sewell*, 1 Jac. & W. 647; *Bryan v. Cormick*, 1 Cox, 422; *Dalmer v. Dashwood*, 2 Cox, 378; *Rhodes v. Mostyn*, 17 Jur. 1007.

(*l*) *Davis v. Duke of Marlborough*, 2 Swans. at p. 138; *Metcalf v. Archbishop of York*, 1 Myl. & Cr. 547.

(*m*) *Langton v. Langton*, 1 Jur. (N.S.) 1078; 7 De G. M. & G. 30.

(*n*) *Langton v. Langton*, *supra*.

(*o*) *Owen v. Homan*, 17 Jur. 861.

(*p*) *Pritchard v. Fleetwood*, 1 Mer. 54, 722.

(*q*) *Stilwell v. Wilkins*, Jac. 280; and see *Huguenin v. Baseley*, 13 Ves. 105.

(*r*) *Lancashire v. Lancashire*, 9 Beav. 120; *George v. Evans*, 4 Y. & C. 211.

(*s*) *Per Lord ELDON, Lloyd v. Passingham*, 16 Ves. at p. 70.

Paragraphs
836—837

There must also have been a reasonable probability that the persons, who claimed to disturb the possession, would ultimately establish a title to it (*t*). Hence where possession had not been obtained by fraud, but was held under the sanction of the court, and the property was not shown to be in imminent danger, a receiver was refused on appeal after a verdict at law, not completed by judgment, and after which a motion had been granted for a new trial (*u*). And the question would not be affected by the circumstance that the legal estate was outstanding in trustees, because they hold for the party whose claim shall be ultimately successful (*x*).

A receiver has been appointed against persons in possession of the legal estate, under a voluntary settlement, at the instance of a subsequent purchaser, claiming under the settlor for valuable consideration; on the ground that the purchase, though said to be for an inadequate consideration, had been held to be enforceable (*y*). And so, where the applicant could not use his legal remedy, by reason of a breach on the part of the legal owner in possession, of a contract which the court could enforce (*z*).

Receiver not
appointed to
supersede
trustees for
mortgagees
in absence of
misconduct.

837. A receiver will not be appointed at the instance of one of several persons entitled to a charge upon an estate which is vested in trustees upon trust for sale of the estate and payment of the charges, where it is not shown that the appointment would be beneficial to the estate, and no misconduct (*a*) or mismanagement is imputed to the trustees; nor against consignees of colonial estates, entitled to the consignments under a covenant, where they have duly applied the produce, and have neither made an oppressive use of their powers, nor an improper disposition of the surplus (*b*).

And no receiver will generally be appointed, merely on account of the death or disclaimer of some or one of several trustees, without the consent of the others, or other of them (*c*); but in such cases (*d*), or if the estate be endangered by the misconduct of one trustee (*e*),

(*t*) *Bainbrigge v. Baddeley*, 3 Mac. & G. 413; 13 Beav. 355; *Clark v. Dew*, 1 Russ. & Myl. 103; and see *Owen v. Homan*, 3 Mac. & G. 378, on ground of doubtful title; affirmed by House of Lords on ground of suspected fraud, 4 H. L. C. 997; see also *Davenport v. Davenport*, 7 Hare, 217; *Haigh v. Jagger*, 2 Coll. C. C. 231; *Collard v. Allison*, 4 Myl. & Cr. 487; *Landon v. Morris*, 5 Sim. 247.

(*u*) *Bainbrigge v. Baddeley*, *supra*.

(*x*) *Id.*

(*y*) *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180.

(*z*) *Shakel v. Duke of Marlborough*, 4 Mad. 463; *Free v. Hinde*, 2 Sim. 7.

(*a*) *Barkley v. Lord Reay*, 2 Hare, 306.

(*b*) *Bunbury v. Winter*, 1 Jac. & W. 255.

(*c*) *Browell v. Reed*, 1 Hare, 434.

(*d*) *Tidd v. Lister*, 5 Mad. 429; *Brodie v. Barry*, 3 Mer. 695; *Beaumont v. Beaumont*, cited 3 Mer. 696.

(*e*) *Middleton v. Dodswell*, 13 Ves. 266.

a receiver will be appointed on the consent of the others ; and without any consent where all the trustees misconduct themselves (*f*). Paragraphs
837—840

838. A receiver may be appointed in a foreclosure suit against the mortgagor in possession, having the legal title, on the application of an equitable mortgagee (*g*) ; and over the rents and profits, where there are several mortgagors, tenants in common, though one of them be absent, if the other be in possession of the rents (*h*). There was formerly a difficulty in giving this relief in a redemption suit, because it was not generally competent for a defendant to apply for relief against a plaintiff without filing a cross bill (*i*). But relief properly claimed by a defendant may now be given in the same suit, and any party may apply for a receiver (*k*). Appointed
in foreclosure
suit by
equitable
mortgagee or
in redemption
suit.

A receiver can be appointed over an estate where the equitable owner has absconded, and his residence is unknown (*l*). Where his residence is known he can be served out of the jurisdiction (*m*).

839. Receivers are also appointed as against the mortgagor's trustee in bankruptcy (*n*), and against the liquidator of a mortgagor company (*o*). Other cases
in which
receivers
appointed.

SUB-SECTION (3).—*Of what Property a Receiver may be appointed.*

840. A receiver may generally be appointed over any property, real or personal, which may be taken in execution at law (*p*), (upon an analogy to which remedy the creditor's right to a receiver is founded) (*q*), or which is assets in equity. And even a Government pension (*r*), or office under the Crown (*s*) (**454**), may be the subject of a receivership, provided the profits be payable out of some certain fund ; for otherwise (as in the case of the salary in the nature of fees attached to an office held under the Treasury, Generally
over all
property on
which execu-
tion may be
levied.

(*f*) *Wilson v. Wilson*, 2 Keen, 249.

(*g*) *Aberdeen v. Chitty*, 3 Y. & C. 379.

(*h*) *Holmes v. Bell*, 2 Beav. 298.

(*i*) *Brown v. Newall*, 2 Myl. & Cr. 558 ; *Wynne v. Griffith*, 1 Sim. & St. 147 ;
v. ———, 2 Dick. 778.

(*k*) Judicature Act, 1873, ss. 24 (3), 25 (8) ; Rules, 1883, Ord. L. r. 6.

(*l*) *Dowling v. Hudson*, 14 Beav. 423 ; see *Coward v. Chadwick*, 2 Russ. 150 n., 634 ; *Gibbins v. Mainwaring*, 9 Sim. 77 ; *Maguire v. Allen*, 1 Ba. & Be. 75 ; *Quin v. Gunn*, 1 Hog. 75 ; and see other cases cited in *Dowling v. Hudson*, 14 Beav. 424, note.

(*m*) 4 & 5 Will. 4, c. 82 ; Rules, 1883, Ord. XI.

(*n*) *Deacon v. Arden*, 50 L. T. 584.

(*o*) *Willmott v. London Celluloid Co.*, 52 L. T. 642.

(*p*) See *Hope v. Croydon and Norwood Tramways Co.*, 34 Ch. D. 730.

(*q*) *Davis v. Duke of Marlborough*, 1 Swans. at p. 83. Receiver and manager of a newspaper till hearing of cause, he undertaking to print, publish and edit the paper, and forthwith to register himself proprietor according to the statute. (*Chaplin v. Young*, 6 L. T. (N.S.) 97.)

(*r*) *Noad v. Backhouse*, 2 Y. & Coll. C. C. 529. And it appears that no order on the Lords of the Treasury is necessary. (See *McCarthy v. Goold*, 1 Ba. & Be. 387.)

(*s*) *Blanchard v. Cawthorne*, 4 Sim. 566.

Paragraphs
840—841

and paid out of a sum annually voted by Parliament for a particular purpose, and for which no action could be maintained) (*t*) there can be no receiver. So there can be no receiver of rates, which are to be assessed and collected at a future time; for until the assessment there is nothing to collect (*u*). But there may be of the tolls of turnpike roads, or of canal and railway companies, or the like, because these are fixed payments in the nature of rent (*x*). And this, though the act give special powers to the mortgagees, whose interest is in arrear (without prejudice to their other rights and remedies), to obtain a receiver in another way, *ex. gr.*, by an application to magistrates (*y*).

Receivers of
revenues of
public under-
takings but
not managers
appointed at
suit of debenture
holders.

841. Holders of debentures of companies formed for carrying out public undertakings, such as railways, canals, tramways, water-works and the like, are entitled to the appointment of a receiver, the appointment of a receiver being the only equitable remedy open, the right of sale of foreclosure having as already stated (**174**) in the public interest been denied (*z*). A receiver will be appointed under such circumstances, in favour of a debenture holder whose principal is due, and who has given six months' notice for payment of it, although there be no interest in arrear (*a*), or even where neither principal nor interest is in arrear if the security is jeopardized (*b*). But note, that where an undertaking of a public nature, *ex. gr.* a railway, canal, or tramway, etc. is carried on by a company empowered by statute, (and whether the company be incorporated by special Act or under the Companies Act, 1862 (*c*)); or, *à fortiori*, where the undertaking is carried on by commissioners, the appointment of a receiver does not supersede the powers of the Act, or make the future management illegal, as being carried on by unauthorized persons. The *management* remains in its original hands, and

(*t*) *Cooper v. Reilly*, 2 Sim. 560.

(*u*) *Drewry v. Barnes*, 3 Russ. 94. But such an appointment is said to have been made by Lord St. LEONARDS in *Gibbons v. Fletcher*, cited 11 Hare, 251.

(*x*) *Dumville v. Ashbrooke*, 3 Russ. 98 n.; and see *Knapp v. Williams*, 4 Ves. 430, n.; *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 142; *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332; *Lord Crewe v. Edleston*, 1 De G. & J. 93; *De Winton v. Mayor, etc., of Brecon*, 26 Beav. 533.

(*y*) *Fripp v. Chard Rail. Co.*, 17 Jur. 887.

(*z*) *Furness v. Caterham Rail. Co.*, 25 Beav. 615.

(*a*) *Hopkins v. Worcester and Birmingham Canal Co.*, L. R. 6 Eq. 437; *Bissell v. Bradford Tramways Co.*, [1891] W. N. 51. And where the assets of an ordinary company whose assets can be taken in execution are threatened by judgment creditors, a receiver and manager will be appointed in a debenture holder's action although neither principal nor interest be due. *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574; *Wildy v. Mid-Hants Rail. Co.*, 16 W. R. 409; *Makins v. Percy Ibtson & Co.*, [1891] 1 Ch. 133; *McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148.

(*b*) *McMahon v. North Kent Ironworks*, [1891] 2 Ch. 148; *Edwards v. Standard Rolling Stock Syndicate*, [1892] 1 Ch. 574; *Thorn v. Nine Reefs, Ltd.*, 67 L. T. 93.

(*c*) *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36.

the receiver does no more than pay the expenses, and apply the surplus proceeds under the order of the court (*d*). The court will, however, appoint a *manager* as well as receiver over the business of an ordinary incorporated company (where the business is not carried on for public purposes), for the preservation of the property, even on an interlocutory application (*e*). And under the Railway Companies Act, 1867, c. 127, s. 4, it is empowered to do so in the case of railway companies, as a *substitute for the remedy by execution against the rolling stock and plant* of the company, which is temporarily taken from the judgment creditor (*f*) (737). In cases where a manager is appointed, the court will usually appoint the managing director or the manager *de facto* to be receiver and manager (*g*). In exceptional cases two may be appointed, one for one set of duties requiring special tact and knowledge, and another for other duties (*h*). But a mortgagee of the rates and tolls of an undertaking has no right to a receiver against a claimant of the lands of the company, though the tolls arise out of such lands, and though a judgment creditor, by taking the lands, may altogether prevent the raising of the tolls (*i*).

Paragraphs
841—843

842. A receiver will not be granted over the rates of a borough, upon the security of which debenture bonds have been issued, where there is no default in payment of interest, and the principal is in course of payment according to the terms of the statutory authority (*k*).

Receivers not
appointed
over borough
rates.

843. It has been held that there might be a receiver, both of past and future appropriations, in respect of the profits of the

Receivers of
fellowships,
canonries,
etc.

(*d*) *Ames v. Trustees of the Birkenhead Docks*, 20 Beav. 332; *Gardner v. London, Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201. See *Griffin v. Bishop's Castle Rail. Co.*, 15 W. R. 1058.

(*e*) *Peck v. Trinsmaran Iron Co.*, 2 Ch. D. 115. And see *Truman v. Redgrave*, 13 Ch. D. 547, for the appointment on interlocutory application of a manager of an hotel, and *Fairfield Shipbuilding, etc., Co. v. London, etc., Steamship Co.*, [1895] W. N. 64, for a manager of a ship. A manager is only appointed for the purpose of selling the business as a going concern. *Whitley v. Challis*, [1892] 1 Ch. 64, 69, 70. As to the distinction between a receiver and manager, see *per JESSEL, M.R. Re Manchester and Milford Rail. Co.*, 14 Ch. D., at p. 653. The judgment in a debenture holder's action should limit the time during which the manager is to continue the business. *Day v. Sykes & Co.*, 55 L. T. 763.

(*f*) As to the receiver to be appointed under s. 54 of the Companies Clauses Consolidation Act, see *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. at p. 125. And as to the right of a judgment creditor of a corporation, to a receiver upon property acquired by the corporation after the Municipal Corporation Acts, see *Arnold v. Mayor of Gravesend*, 2 Jur. (N.S.) 703. And as to the right of a mortgagee after the Corporation Act, against a receiver appointed at the suit of a judgment creditor whose debt originated before the Act, see *Arnold v. Mayor of Gravesend*, 2 Jur. (N.S.) at p. 706.

(*g*) *Makins v. Percy Ibotson & Co.*, [1891] 1 Ch. 133; *Whitley v. Challis*, [1892] 1 Ch. 64.

(*h*) *British Linen Co. v. South American and Mexican Co.*, [1894] 1 Ch. 108.

(*i*) *Perkins v. Deptford Pier Co.*, 13 Sim. 277; and see a somewhat similar point, but turning upon the words of the Companies Clauses Consolidation Act, and of the special Act, in *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. at p. 125.

(*k*) *Preston v. Corporation of Great Yarmouth*, L. R. 7 Ch. 655.

Paragraphs
843—846

fellowship of a college (*l*), and of the canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence, and of attendance on divine service (*m*); the duties of these offices not being considered to be within the rule of public policy (456).

No receiver
of salaries
payable for
performance
of public
duties.

844. The law is otherwise where the payment is to enable the grantee to perform future duties (*n*), as in the case of the half-pay of officers and others in the public service, the alienation of whose stipends would prevent prompt attention to their duties when required (*o*) (454—5). So as to a pension for the support of a dignity, granted as a memorial of and reward for great public services (*p*): though the latter decision seems to have turned considerably upon the language of the statute, which expressly made the receipts of the grantee and his successors proper discharges for the pension. But over pensions which may be lawfully assigned, a receiver will be appointed (*q*).

No receiver of
ecclesiastical
benefice.

845. There cannot be a receiver of the profits of an ecclesiastical benefice, because direct charges upon such property are prohibited by 13 Eliz. c. 20; and no indirect charges thereon by way of judgment, under 1 & 2 Vict. c. 110, s. 13, are of any force (*r*) (458).

Receiver or
manager of
mortgaged
mines.

846. A receiver or manager of mines may be appointed at the instance of a mortgagee of them, even although the *business* was not expressly mortgaged, because of the peculiar nature of the property; a mine being considered in this respect to be in the nature of a trade (*s*). But a receiver and manager of a mine will not be appointed against a mortgagee in possession on the ground of mismanagement by omitting (*t*) to lay out more than a prudent owner would advance, though a larger expenditure would be likely to benefit the mine (1780). It would seem, however, that the mortgagee of an undivided part of a mine might obtain a receiver and manager against the owners of the other parts. Anyhow, his

(*l*) *Feistel v. King's College, Cambridge*, 10 Beav. 491.

(*m*) *Grenfell v. Dean and Canons of Windsor*, 2 Beav. 544.

(*n*) *Davis v. Duke of Marlborough*, 1 Swans. at p. 79. In *Palmer v. Vaughan*, 3 Swans. 173, the question was not decided as to the profits of the office of clerk of the peace; which, it was also argued, is an office touching the administration of justice within 5 & 6 Edw. 6, c. 16.

(*o*) *Grenfell v. Dean and Canons of Windsor*, 2 Beav. at p. 549.

(*p*) *Davis v. Duke of Marlborough*, 1 Swans. 74.

(*q*) *Heald v. Hay*, 3 Giff. 467.

(*r*) *Hawkins v. Gathercole*, 6 De G. M. & G. 1.

(*s*) *Campbell v. Lloyds, etc., Bank*, 58 L. J. Ch. 424; [1891] 1 Ch. 136 n.; expl. in *Whitley v. Challis*, [1892] 1 Ch. 64; *County of Gloucester Bank v. Rudry, Merthyr, etc., Colliery Co.*, [1895] 1 Ch. 629; *Peek v. Trinsmaran Iron Co.*, 2 Ch. D. 115. The appointment has been made at the instance of an unpaid vendor. *Boyle v. Bettus Llanwit Colliery Co.*, 2 Ch. D. 726.

(*t*) *Rowe v. Wood*, 2 Jac. & W. 553.

mortgagor could do so, and it is submitted that he has all the rights of his mortgagor (*u*). Paragraphs
846—848

847. A receiver may be appointed over a colonial estate (*x*); and as well over property of a personal kind as over the rents, profits and produce of realty, in a dependency or foreign country if the owner is within the English jurisdiction (*y*); and he will be authorized, if it be found expedient, to appoint an agent (with the approbation of the judge) in the foreign country, power being given to execute the necessary instrument to enable such agent to act (*a*). As to property which is out of the jurisdiction, the receiver will recover possession of it according to the laws of the country in which it is found (*b*).

Where the estate was in a distant dependency, the court (with the view of retaining its power over the receiver) ordered the appointment of a person in this country, who might appoint his own agent in the country where the estate was situate (*c*). But in the case of an executor, where there are assets abroad, the court will appoint a receiver in the foreign country, who shall find sureties in England, and so relieve the receiver from all responsibility with respect to his agent (*d*).

SUB-SECTION (4).—*At what Stage of the Action the Appointment may be made.*

848. After the action has been commenced (*e*), a receiver may be appointed, either at the hearing or by interlocutory order (*f*) (which may be either before or after final judgment (*g*)); and even before appearance of the owner of the equity of redemption, if, but not unless, from the state of the security, or other urgent circumstances, an immediate appointment be necessary (*h*). The appointment has also been made before service of the writ, where

(*u*) *Jeffreys v. Smith*, 1 Jac. & W. 298.

(*x*) See *Barkley v. Lord Reay*, 2 Hare, 306.

(*y*) *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co.*, [1892] 2 Ch. 303.

(*a*) *Hinton v. Galli*, 24 L. J. Ch. 121; see *Toller v. Carteret*, 2 Vern. 494. As to order for receiver in England of Irish estates, see *Houlditch v. Donegal*, 8 Bli. (n.s.) at p. 343; 2 & 3 Will. 4, c. 33; 4 & 5 Will. 4, c. 82; and see *Cartwright v. Petters*, 2 Swans. 325, n.

(*b*) *Smith v. Smith*, 10 Hare, App. lxxi.

(*c*) — *v. Lindsey*, 15 Ves. 91.

(*d*) *Cockburn v. Raphael*, 2 Sim. & St. 453.

(*e*) Anon. 1 Atk. 578; *Exp. Mountfort*, 15 Ves. 445. In *Pitcher v. Helliar* (2 Dick. 580), Lord THURLOW in a very urgent case said he would have ordered a receiver even if there had been no bill.

(*f*) Judicature Act, 1873, s. 25 (8).

(*g*) *Smith v. Cowell*, 6 Q. B. D. 75; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.

(*h*) *Meaden v. Sealey*, 6 Hare, 620; and see *Hart v. Tulk*, 6 Hare, 611; *Caillard v. Caillard*, 25 Beav. 512; *Taylor v. Eckersley*, 2 Ch. D. 302.

Paragraphs
848—849

the residence of an absconding defendant was unknown (*i*), and where he was out of the jurisdiction (*k*). But absence beyond the jurisdiction is no longer alone a reason for appointing a receiver before service of the writ, as an order may be made for service abroad (*l*); and upon an application for a receiver, before service on an absent defendant, the court did not make the appointment on the ground of absence, but because the person in actual possession was before the court; the absent defendant being one of two tenants in common, the other of whom was in possession of the whole of the rents (*m*).

If a defendant have made an affidavit in the cause, although no formal appearance be entered, he will be considered to have appeared, for the purpose of appointing a receiver (*n*).

Receiver may
be appointed
at or after
hearing,
although not
claimed by
writ.

849. A receiver may be appointed at the hearing, though such relief was not asked, if the facts stated are sufficient to justify the appointment (*o*); but before the Judicature Act, 1873, it could not be done on the defendant's application (*p*). It may also be done after judgment (*q*) in cases of urgency, without any supplemental suit (*r*); as where a person not a party to a cause had been so long in possession without accounting, that there was danger of his acquiring an absolute title by adverse possession (*s*); or where the mortgagee in possession, not showing clearly that any thing was due upon his prior mortgage (**833**), the next security (being on a life estate) was in danger of being lost by the delay, and the possible inability of the first mortgagee to refund if he should be ordered to do so (*t*), and a similar result will follow if it appear that the circumstances would, at the hearing, have entitled the party to a receiver; as if a balance be shown to be in the hands of the mortgagee (*u*); or if the defendant, by neglecting to bring in the deeds, has prevented the plaintiff from

(*i*) *Dowling v. Hudson*, 14 Beav. 423; *Pitcher v. Helliard*, 2 Dick. 580; *Maguire v. Allen*, 1 Ba. & Be. 75; see *Arthurs v. Arthurs*, 1 Hog. 95.

(*k*) *Tanfield v. Irvine*, 2 Russ. 149; *Coward v. Chadwick*, 2 Russ. 150, n., 634; *Gibbins v. Mainwaring*, 9 Sim. 77; see *Noad v. Backhouse*, 2 Y. & Coll. C. C. 529.

(*l*) *Drummond v. Drummond*, L. R. 2 Ch. 32; Judicature Act, 1875, Rules, 1883, Order. XI.

(*m*) *Holmes v. Bell*, 2 Beav. 298.

(*n*) *Vann v. Barnett*, 2 Bro. C. C. 158.

(*o*) *Malcolm v. Montgomery*, 2 Mol. 500; *Osborne v. Harvey*, 1 Y. & Coll. C. C. 116; though *KINDERSELY*, V.-C., seems to have thought otherwise: *Wright v. Vernon*, 3 Drew. 122.

(*p*) *Barlow v. Gains*, 8 Beav. 329. But see Judicature Act, 1873, s. 24 (3).

(*q*) See *Smith v. Covell*, 6 Q. B. D. 75; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.

(*r*) *Bowman v. Bell*, 14 Sim. 392; *Thomas v. Davies*, 11 Beav. 29; *Wright v. Vernon*, 3 Drew. 112.

(*s*) *Thomas v. Davies*, *supra*.

(*t*) *Hiles v. Moore*, 15 Beav. 175.

(*u*) *Att.-Gen. v. Mayor of Galway*, 1 Mol. 95-104.

obtaining the benefit of a decree for sale (*x*). But not, it seems, after judgment, where no subsequent circumstances have made it necessary for the protection of the estate or otherwise (*y*). Paragraphs
849—851

Where it is otherwise proper to make the appointment after judgment, it may be made, although by the judgment, further consideration (*z*), (or of the matters in question between the plaintiff and the particular defendant (*a*)), have been reserved; such questions not being affected by the appointment. But no appointment will be made after foreclosure absolute, even where the mortgagor remains in possession pending the settlement of the proper form of conveyance (*b*).

It has been held in Ireland, that, after a decree taken *pro confesso*, the application for a receiver must be supported by an affidavit as to the sum due for principal, interest, and costs, after all just allowances, and that the defendant is in possession (*c*).

SUB-SECTION (5).—*The Authority of the Receiver.*

850. It is a general rule, that the receiver should do no act which may involve the estate in expense without the sanction of the court. Therefore he cannot of his own authority enter into contracts relating to the property. If he does so, he is not acting as agent of either party so as to bind them, and is merely personally liable (*d*). Neither can a receiver *ex mero motu* bring ejectment (*e*); and if there be two receivers, both acting under the authority of the court, one of them ought not to take possession against the other; but he, or those at whose instance he was appointed, should seek the directions of the court (*f*). Cannot in
general incur
expense or
liability
without
sanction of
court.

Nor is it proper for the receiver to defend actions brought against him in respect of the estate, without the sanction of the court; especially if they arise out of acts improperly done by the receiver of his own authority; and if he be unsuccessful, he will not be allowed the costs of such actions (*g*). But if he succeed without putting the estate to the expense of an application, which he might have made for his own security, he has the same right to be indemnified as if he had applied to the court (*h*).

851. Formerly a receiver in this country could make no expenditure (*i*), or none to any considerable extent (*k*), without the leave Receiver
makes
expenditure

(*x*) *Harris v. Shee*, 6 Ir. Eq. R. 543.

(*y*) *Wright v. Vernon*, 3 Drew. 112; see *Hackett v. Snow*, 10 Ir. Eq. R. 220.

(*z*) *Hiles v. Moore*, 15 Beav. 175. (*a*) *Cooke v. Gwyn*, 3 Atk. 689.

(*b*) *Wills v. Luff*, 38 Ch. D. 197. (*c*) *Rogers v. Newton*, 2 Ir. Eq. R. 40.

(*d*) *De Grelle & Co. v. Bull*, 10 Reps. 97; *Burt v. Bull*, [1895] 1 Q. B. 276.

(*e*) *Wynn v. Lord Newborough*, 3 Bro. C. C. 87.

(*f*) *Ward v. Swift*, 6 Hare, 309. (*g*) *Swaby v. Dickon*, 5 Sim. 629.

(*h*) *Bristowe v. Needham*, 2 Ph. 190.

(*i*) *Fletcher v. Dodd*, 1 Ves. Jun. 85; *Morris v. Elme*, 1 Ves. Jun. 139.

(*k*) *Att.-Gen. v. Vigor*, 11 Ves. 563.

Paragraphs
851—853

without leave
at his peril.

of the court, or at least not at the discretion of the receiver (*l*). Greater power was, however, always given to managers of West India estates, which otherwise would be ruined by the expense of remitting part of the produce which might in the first instance be properly applied there (*m*) (225). Subsequently the course, both as to receivers and committees of lunatics, was to direct an inquiry into the circumstances of the expenditure, and whether it was for the benefit of the estate and of the parties interested therein; and if it was found to have been so (or it seems if the trustees of or persons entitled to the estate had directed the expenditure) the amount was allowed to the receiver (*n*). At present all such matters are considered in the judge's chambers, and the necessary expenditure is authorized there. A receiver being an officer of the court appointed on behalf of all parties the person at whose instance he is appointed is not (in the absence of express undertaking) liable for his debts (*o*).

Court may
sanction
expenditure
in urgent
cases,
although all
parties not
before it.

852. In case of emergency, where it is necessary for the preservation of the property, the court has jurisdiction to authorize a receiver to raise money by mortgage of the property, even where all parties are not before the court, as in the case of a debenture holder's action (*p*). But although the court has jurisdiction by this or other means to authorize expenditure for preventing the property being deteriorated (*ex. gr.* for keeping on a business as a going concern), yet where all parties interested are not before the court it will not do so, unless the expenditure is very urgent and not merely speculative (*q*).

How far
receiver may
distrain
without
leave.

853. It seems (*r*) that the receiver may distrain, at his own discretion, for rent which has accrued within the year; but if more than a year's rent be behind, the order of the court should be obtained. It appears to have been a constant practice of receivers to come to the court, in all cases, on the ground that the distress must be in the name of the owner of the legal estate; but this was said by Lord *Hardwicke* (*s*) to be unnecessary and inconvenient, because the tenant has an opportunity of removing his goods; and the court does not make an immediate order, but allows a future day; if, however, the legal right be doubtful, it would be proper to

(*l*) *Blunt v. Clitheroe*, 6 Ves. 799.

(*m*) *Morris v. Elme*, 1 Ves. Jun. 139.

(*n*) *Blunt v. Clitheroe*, 6 Ves. 799; *Att.-Gen. v. Vigor*, 11 Ves. 563; *Tempest v. Ord*, 2 Mer. 55; *Re Graham, Graham v. Noakes*, [1895] 1 Ch. 66. As to committees, *Exp. Marton*, 11 Ves. 397; *Exp. Hilbert*, 11 Ves. 397.

(*o*) See *Gosling v. Gaskell*, [1897] A. C. 575; where, however, the receiver was appointed by the mortgagees.

(*p*) *Greenwood v. Algeiras (Gibraltar) Rail. Co.*, [1894] 2 Ch. 205.

(*q*) *Securities and Properties Corporation v. Brighton Alhambra*, 62 L. J. Ch. 566; 68 L. T. 249.

(*r*) *Brandon v. Brandon*, 5 Mad. 473.

(*s*) *Pitt v. Snowden*, 3 Atk. 750; see *Mitchel v. Duke of Manchester*, 2 Dick. 787. Order for tenant who had not attorned to pay arrears and costs. (*Hobson v. Sherwood*, 19 Beav. 575.)

come to the court. The proper course is, to make the tenants attorn to the receiver, in whose name the distress may then be made (*t*). This will be ordered on motion, and if the tenants oppose, on the ground of the pendency of an action commenced before the appointment of the receiver, for the same rent, the motion will be ordered to stand over until the action has been tried. The costs are not given against the tenants in such a case, but it is presumed that they would be subjected to costs, if an improper opposition were made to the motion (*u*). The attornment creates a tenancy by estoppel between the tenant and the receiver only, and none between the tenant and the person entitled to the legal estate, so as to enable the latter to distrain (*x*).

Paragraphs
853—854

854. Where the person in possession refuses to deliver possession to the receiver, it is not necessary in the first instance to make him a party to the suit by reason of its not appearing what is the nature of his interest. But the common direction being, that the tenants shall attorn, the court treats the person in possession as a tenant (*y*); and the course is to move that he may attorn, and the motion will be allowed to stand over, that he may inform the court whether he be a tenant or not. But unless he show the contrary, it will be assumed, it seems, that he is a tenant, and he will be ordered to attorn accordingly.

Person in
possession
refusing to
give it to
receiver.

Where the person in possession does not hold as a mere tenant, the court will order that possession be given to the receiver (*z*); and, if it be refused, the receiver will be put into possession by the ordinary process of the court; viz. (*a*), by writ of possession, an order for which may be obtained on motion after due service of the decree or order for delivery of possession, and upon proof of demand and refusal to obey such order. And it is insufficient (*b*), if the affidavit show a refusal during the whole of the time limited by the order for delivery of possession, without showing also a refusal up to the time of making the motion.

Where the mortgagor is in possession, and the order does not direct him to attorn, the liability to pay rent commences from the demand by the receiver (*c*). Where the order directs him to attorn

(*t*) *Hughes v. Hughes*, 1 Ves. Jun. 161; 3 Bro. C. C. 87; and the decision of Lord NORTHINGTON, *Raincock v. Simpson*, cited 1 Dick. 120, n.; *Sharp v. Carter*, 3 P. Wms. 379, n.

(*u*) *Hobhouse v. Hollcombe*, 2 De G. & Sm. 208.

(*x*) *Evans v. Mathias*, 3 Jur. (n.s.) 793.

(*y*) *Reid v. Middleton*, Turn. & Russ. 455.

(*z*) *Griffith v. Griffith*, 2 Ves. Sen. 400; *Davis v. Duke of Marlborough*, 2 Swans. 108—116, and form there.

(*a*) *Ferguson v. Tadman*, cited 2 Sim. 401; *Green v. Green*, 2 Sim. 394. See Rules 1883, Order XLVII., and *Wyman v. Knight*, 39 Ch. D. 165.

(*b*) *Webster v. Taylor*, 18 Jur. 869.

(*c*) *Yorkshire Banking Co. v. Mullan*, 35 Ch. D. 125; *Randfield v. Randfield*, 7 W. R. 651.

Paragraphs
855—856

at a rent, or at a rent to be fixed in chambers, the liability commences from the date of the order (*d*).

Should not
let property
without
leave.

855. Directions for the receiver to manage set and let, are not now inserted in the order of appointment, the judges having power to give the necessary directions in chambers.

The receiver ought not to let without the approbation of the court (*f*), even, it would seem, for a single year (*g*); but it appears that he may give a good notice to quit to a tenant from year to year (*h*); for a tenant having held over after such a notice, the Court of Chancery gave the receiver leave to sue for double rent.

He should apply for liberty to let the estate before the old lease expires; and although if he neglect to do so, he will be at liberty to make what he can of the estate during the current year, he will be visited with any loss which may arise (*i*).

To avoid the necessity for constant applications to the court, for permission to let a colonial estate, an inquiry may be directed beyond what term the receiver shall not be permitted to let (*k*).

Proceedings
by stranger
to action
against
receiver.

856. A motion to restrain a receiver from doing acts not within his authority, will be dismissed with costs if made by persons who are strangers to the action (*l*); *ex. gr.*, by tenants of the estate. Nor can a stranger to an action generally obtain, on motion or petition, payment of money in the hands of the receiver, although it may be justly due to him, and the receiver may have funds in hand applicable to payment (*m*). Such an order has, however, been made for payment of the profits of an estate upon which the receiver had entered without authority (*n*); on the ground that the court will not study the form of doing justice, in a matter arising out of a possession held by itself. As in like manner, if a person have entered into an agreement with the court, it will use a summary remedy against him; and has, therefore, restrained on motion (*o*) a tenant, to whom the receiver had let the estate from year to year, from carrying off crops contrary to the custom of the country, though the tenant was no party to the suit.

(*d*) *Re Burchnall*, *Walker v. Burchnall*, [1893] W. N. 171; *Lloyd v. Mason*, 2 Myl. & Cr. 487.

(*f*) *Morris v. Elme*, 1 Ves. Jun. 139; *Swaby v. Dickon*, 5 Sim. 629.

(*g*) *Wynne v. Lord Newborough*, 1 Ves. Jun. 164.

(*h*) See *Wilkinson v. Colley*, Burr. 2694; *Doe v. Read*, 12 East, 57.

(*i*) *Wilkins v. Lynch*, 2 Mol. 499.

(*k*) — *v. Lindsey*, 15 Ves. 91.

(*l*) *Wynn v. Lord Newborough*, 3 Bro. C. C. 87.

(*m*) *Wastell v. Leslie*, 15 Sim. 453, n.; *Brocklebank v. East London Rail. Co.*, 12 Ch. D. 839.

(*n*) *Neate v. Pink*, 15 Sim. 450; affirmed 3 Mac. & G. 476.

(*o*) *Walton v. Johnson*, 15 Sim. 352; and see *Casamajor v. Strode*, 1 Sim. & St. 381.

857. If the tenant for life of a mortgaged estate, with power to lease, exercise the power *pendente lite* and after the appointment of a receiver, the lessees are considered, as against prior incumbrancers in the estate, as tenants from year to year to the receiver; and, as such, are entitled to notice to quit. And the receiver may be ordered to let the estate without prejudice to their rights against their lessor, and to bring ejectment against them in case of their resistance to the new letting (*p*).

Paragraphs
857—860

Lease by
tenant for
life after
appointment
of receiver.

Where the court directs the receiver to give any particular person the option of being tenant, it reserves power to the receiver to inspect the state of the property (*q*).

858. The receiver is entitled to receive all rents in arrear at the date of his appointment (*r*); and a person, who admits a sum of money to be due from him to the estate, may not dispute the receiver's right to collect it (*s*). But produce which has been already separated from the estate, though not yet converted into money, does not belong to the receiver. Therefore (*r*) where a manager was appointed of a West India estate, with directions to receive and remit the rents and produce, the consignees were not ordered to pay into court the surplus moneys arising from the produce of the estate which had been severed, and sent by the mortgagor to the consignees, but had not been received by them at the date of the order. Neither can the receiver claim rent from a person who, being in possession of the estate, has been ordered to pay an occupation rent, in respect of any period prior to such order; from the date of which only his tenancy and liability to payment of rent commences (*t*).

Receiver
entitled to
rents in
arrear.

859. When the receiver is informed that the defendant has interfered with the rents, he should move for an attachment; and it is sufficient if he swear that he had the information from the tenants, and that he believes it (*u*). The interference of the owner of the inheritance with the rents, does not exempt the receiver from being charged with the whole amount, but he must discharge himself by showing what the inheritor received, or hindered him from getting (*x*).

If defendant
interferes
with rents
he may be
attached.

860. Where money comes into the hands of a receiver, appointed in a foreclosure suit, at the instance of the plaintiff, and no particular directions have been given for its application, it belongs in the first instance to the plaintiff, who will be entitled (*y*) to receive it

To whom
rents
collected by
receiver
belong, on
dismissal of
foreclosure
suit.

(*p*) *Lord Mansfield v. Hamilton*, 2 Sch. & Lef. 28.

(*q*) *Baylies v. Baylies*, 1 Coll. C. C. 537.

(*r*) *Codrington v. Johnstone*, 1 Beav. 520.

(*s*) *Wood v. Hitchings*, 2 Beav. 289.

(*t*) *Lloyd v. Mason*, 2 Myl. & Cr. 487.

(*u*) *Anon.*, 2 Mol. 499.

(*x*) *Hamilton v. Lighton*, 2 Mol. 499.

(*y*) *Paynter v. Carew*, 18 Jur. 417. The observations of the V.-C. seem to have been misunderstood by the reporter in *Kay*, App. xxxvi.

Paragraphs
860—862

on the dismissal of the suit. And the order for payment may be made on motion after the suit is out of court by the dismissal (z). If incumbrancers come in for examination *pro interesse suo*, and obtain a certificate that they are prior mortgagees, they are entitled to have possession from the sequestrators; and to have the rents and profits, which have been received by the latter, applied in payment of their mortgage debt, after paying the sequestrator's costs, and the costs of the application (a).

Duty of
receiver
where
owner of
equity of
redemption
is an infant.

861. The court will not direct the receiver of an infant's estate to keep down the interest of mortgages until the mortgages have been established, because this would be to assume that the debts were due (b).

SUB-SECTION (6).—*Of the Receiver's Right to apply to the Court.*

Receiver
applies to
court through
the plaintiff.

862. It has been laid down that, except in case of necessity, the receiver ought not to present a petition (c), or to be a co-petitioner (d), or to originate any other proceeding in a cause. If an application to the court become necessary, the receiver should apply to the plaintiff, or probably to any other party to the suit at whose instance he may have been appointed; and if, after he had done so, no application be made, or no proper means be taken to relieve the receiver from his difficulty, he may apply himself, and will then be entitled to his costs. There are, however, cases in which receivers have applied to the court without any objection being raised (e).

But if a party to the cause be appointed a receiver, he does not lose his privileges as a party, and may apply to the court as if he did not hold the office (f). And in some cases it is necessary that he should join in the proceeding. Thus, if the receiver pay money in his hands to the solicitors of the plaintiffs, who are also his own solicitors, without precise instructions as to the application of the moneys, the money is considered to be paid to them as the solicitors

(z) *Id.*; and *Wright v. Mitchell*, 18 Ves. 293; and see also *Re Hoare*, *Hoare v. Owen*, [1892] 3 Ch. 94.

(a) *Walker v. Bell*, 2 Mad. 21, and form of order; *Tatham v. Parker*, 1 Jur. (N.S.) 992; and see *Att.-Gen. v. Coventry*, 1 P. Wms. 308, 309; *Rowley v. Ridley*, 2 Dick. 622; *Re Hoare*, *Hoare v. Owen*, *supra*, dis. from *Delany v. Mansfield*, 1 Hog. 234; *Warren v. Warren*, 13 Ir. Eq. R. 69; *Preston v. Tunbridge Wells Opera House, Ltd.*, [1903] 2 Ch. 323.

(b) *Anon.*, 6 Mad. 9.

(c) *Ireland v. Eade*, 7 Beav. 55; *Parker v. Dunn*, 8 Beav. 497. And see *Exp. Browne*, *Re Maltby*, 16 Ch. D. 497, as to duty of a receiver in bankruptcy or liquidation.

(d) *Murray v. Earl of Scarborough*, Rolls, Nov. 17th, 1855.

(e) See *Mills v. Fry*, G. Coop. 107, before Lord ELDON; *Wickens v. Townshend*, 1 Russ. & Myl. 361, before Lord LYNDBURST; though it was only before the hearing and not at the presenting of the petition, that his character of receiver was complete. *Shaw v. Rhodes*, 2 Russ. 539.

(f) *Scott v. Platel*, 2 Ph. 229.

of the receiver and not of the plaintiff; and the receiver must be a party to an application for payment of the money into court by the solicitors (g). Paragraphs
862—864

SUB-SECTION (7).—*Of the Receiver's Possession.*

863. The possession of the receiver is the possession of the court (h), without whose authority no man may interfere with the receiver, or with property of which he has taken, or has been directed to take, possession (i), either directly, by suing out execution, and taking possession against him, by attachment (k) or by ejection (l), sequestration (m), or any other proceeding, whether of an ordinary kind, or authorized by statute (n), even though none of the profits be taken (o). Even a libel on the business carried on by a receiver and manager is a contempt (p); nor will the receiver's possession be affected by notice given by the mortgagee to the tenants, to pay their rents to him (g). Where, however, the receiver is expressly appointed "subject to the rights of prior incumbrancers," a prior incumbrancer may exercise his rights without the leave of the court (r). Interference
with
receiver's
possession a
contempt of
court.

864. Whether the claimant knew, or not, of the appointment of a receiver, or however clear may be his title, he will be restrained from prosecuting his claim if he have not first obtained the leave of the court (s); and if he has commenced proceedings without leave, he may be obliged to discontinue them, and with leave of the court to commence de novo (t). Even where there is a receiver (to whom the tenants have been ordered to attorn) over the rents and profits of copyholds, the lord may be restrained from an unauthorized proceeding in ejection against a *terre tenant*, upon seizure *quousque* by the bailiff of the manor for want of a tenant (u). Whence it seems that the powers of the receiver override, in this particular, the rights of the lord; and it is the same as to the right of a lessor to recover on a forfeiture, where a receiver has been appointed over the lessee's interest (x). Adverse
claimant
cannot
prosecute
his claim
without
leave.

(g) *Chater v. Maclean*, 1 Jur. (N.S.) 175.

(h) *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. 104.

(i) *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332.

(k) *De Winton v. Mayor of Brecon*, (No 2), 28 Beav. 200.

(l) *Angel v. Smith*, 9 Ves. 335; *Anon.*, 6 Ves. 287; *Evelyn v. Lewis*, 3 Hare, 472.

(m) *Hawkins v. Gathercole*, 16 Jur. 650; and see S. C. 6 De G. M. & G. 1.

(n) *Tink v. Rundle*, 10 Beav. 318. (o) *Hawkins v. Gathercole*, *supra*.

(p) *Helmore v. Smith*, 35 Ch. D. 449; *Whadcoat v. Shropshire Railways Co.*, 9 T. L. R. 589.

(q) *Thomas v. Brigstocke*, 4 Russ. 64.

(r) *Underhay v. Read*, 20 Q. B. D. 209, 218; *Engel v. South Metropolitan Brewing Co.*, [1891] W. N. 31.

(s) *Evelyn v. Lewis*, 3 Hare, 472.

(t) *Lees v. Waring*, 1 Hog. 216.

(u) *Evelyn v. Lewis*, 3 Hare, 472.

(x) *Wadmore v. Trevanion*, cited 3 Hare, 473; and see *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 142.

Paragraphs
865—867

The order
appointing
receiver
should
specify the
property.

Sheriff
seizing
property
in receiver's
possession.

Court uses
power of
committing
for contempt
sparingly.

865. The order of appointment must be so distinct on the face of it, that it may be known of what property the receiver is in possession. Hence, where a receiver was appointed (y) of "the incomes of the outstanding property in the pleadings mentioned," under which order the receiver entered into, and remained, in possession of the real estate for several years, and the tenants attorned to him; an application to restrain the legal owner from proceeding against the tenants, without the leave of the court, was refused with costs. The appointment should be over the rents of the particular property, and should be followed by a direction to the owner to deliver possession, or that the tenants should attorn (z).

866. There appears to be no direct authority for the committal of a sheriff for the act of his undersheriff, in seizing property which was in the possession of a receiver under the court, where the proceeding cannot be inferred to be the sheriff's personal act. But it is said, that in case of necessity, as where the public safety requires it, the sheriff himself may be committed. In the case cited (a), the sheriff and undersheriff having submitted, were ordered on appeal to withdraw, and to pay the costs and expenses of the seizure, and of the application against them in the court below.

The sheriff will also be restrained, if necessary, from compelling the receiver to interplead, and will be ordered to pay the costs of proceedings taken for that purpose; and if the execution creditor be before the court, he will be restrained from proceeding against the sheriff in relation to the property seized by the latter, or any other property in the receiver's possession. If the execution creditor be not before the court this cannot be done, but the sheriff can come to the court for protection if necessary.

And that the execution creditor may not suffer loss by the receiver's possession (in case it shall appear in proceedings taken by the creditor, that his right ought not to have been interfered with by such possession), the receiver may be ordered (b) to retain within the bailiwick, for fourteen days, goods, chattels, and effects equal in value to those seized by the sheriff, not exceeding what would be necessary to satisfy the levy in the writ of *feri facias*; such value, if necessary, to be settled in the judge's chambers.

867. The court uses its powers of committal sparingly, and only when it is necessary to vindicate its authority; and will not sanction a motion to commit a person for disturbing a receiver's possession, when it is made long after the act complained of, and not for the protection of the receiver's possession, but to compel payment of

(y) *Crow v. Wood*, 13 Beav. 271.

(z) See *Griffith v. Griffith*, 2 Ves. Sen. 400; *Davis v. Duke of Marlborough*, 2 Swans. at p. 116; *Metcalfe v. Pulvertoft*, 2 Ves. & B. at p. 207.

(a) *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. 104.

(b) *Id.*

his expenses after the question relating to the possession is settled. The proper course is to make such a direct application for the costs, as is warranted by the circumstances (*c*). Paragraphs
867—868

Where a receiver, appointed by the court, committed waste in the long vacation, and all parties concerned thereupon served him with a paper discharging him; the court refused, under the circumstances, to grant an attachment against them (*d*).

868. The court may give leave to a person, who claims an interest in real or personal property paramount to that of a receiver, or of a sequestrator, to bring an action, or to come in and be examined *pro interesse suo*; or an inquiry may be directed as to the claimant's interest in the property (*e*). And if he have already brought an action, or have otherwise interfered with the receiver's possession without leave of the court, the order which restrains these acts will also give him leave, or direct him to be examined *pro interesse suo*, the plaintiff in the cause being directed to exhibit interrogatories for that purpose (*f*). Leave given
to a person
who claims
adversely to
receiver to
come in and
prove his
interest.

But the particular mode of proceeding is in the discretion of the court, which considers in what manner the right can best be tried, and which will also, if it be necessary, direct the trial of an issue (*g*). But where the facts are not disputed, and there is only a question of law, which may be fitly decided in court, and no further materials are necessary to enable the court to form its judgment on the question, the person who disputes the receiver's appointment will not be compelled to commence an action or to come in for examination *pro interesse suo* (*h*). Thus leave has been given (*i*) at the hearing of the claimant's petition, to sue out an *elegit* against a life estate in the receiver's possession. Where it was held that no receiver ought to have been appointed, leave was given (*k*) at the same time to the execution creditor to levy, notwithstanding the appointment.

And it seems that in a difficult case (to give time for an appeal), the execution creditor will have leave to levy at the expiration of

(*c*) *Ward v. Swift*, 6 Hare, 309.

(*d*) *Bell v. Spereman*, Sel. Ca. in Ch. 59.

(*e*) *Anon.*, 6 Ves. 287; *Angel v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 Jac. & W. 176; *Walker v. Bell*, 2 Mad. 21; *Pelham v. Duchess of Newcastle*, 3 Swans. 290, n.; *Wharam v. Broughton*, 1 Ves. Sen. 180; *Hamlyn v. Lee*, 1 Dick. 94; but this case is not accurate; *Empringham v. Short*, 3 Hare, at p. 469; *Gomme v. West*, Dick. 472; *Reeves v. Cox*, 13 Ir. Eq. R. 247. *Re Henry Pound, Son & Hitchins*, 42 Ch. D. 402; *Lane v. Capsey*, [1891] 3 Ch. 411.

(*f*) *Johnes v. Cloughton*, Jac. 573.

(*g*) *Empringham v. Short*, 3 Hare, 461. This and several of the other cases cited relate to sequestrations, which have been repeatedly declared to stand upon the same footing as those relating to receivers.

(*h*) *Per PARKER, C.J., Att.-Gen. v. Coventry*, 1 P. Wms. 308; *Dixon v. Smith*, 1 Swans. 457.

(*i*) *Gooch v. Haworth*, 3 Beav. 428.

(*k*) *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. at p. 125.

Paragraphs
868—869

a certain period, the debtor undertaking in the meantime to keep sufficient property within the bailiwick to answer the demand; or it will be ordered, that the petitioners may levy, unless the amount of the demand be paid into the bank to the credit of the cause, within a week from the service of the order; the money to remain in the bank subject to the order of the court, and the receiver to be at liberty to pay it in (*l*).

Where the prior incumbrancer had been guilty of delay in pursuing his own remedies, the court refused his application, that the receiver, who had been appointed at the instance of the *puisne* mortgagee, should apply the rents according to the priorities; but leave was given to bring ejectment. The ground of this decision was, that the prior mortgagee had no right to that relief on petition which he had sought but had not followed up by another proceeding. But no costs were given against the prior incumbrancer (*m*).

How appli-
cation for
leave made.

869. The application for leave to proceed notwithstanding the receiver's possession, or to come in for examination *pro interesse suo*, may be made on summons, by motion, or on petition (*n*); but is commonly made by motion in the Chancery Division or by summons in the King's Bench Division, and is usually framed in the alternative—that the receiver may pay the amount of the claimant's demand, or that the latter may be allowed to proceed.

(*l*) *Id.*

(*m*) *Brooks v. Greathed*, 1 Jac. & W. 176.

(*n*) *Angel v. Smith*, 9 Ves. 335; *Dixon v. Smith*, 1 Swans. 457; *Gooch v. Haworth*, 3 Beav. 428; *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 142; *Russell v. East Anglian Rail. Co.*, 3 Mac. & G. at p. 125; *Brooks v. Greathed*, 1 Jac. & W. 176.

CHAPTER VII.

Of the Creditor's right to the possession of the Mortgaged Property, and the effect of such right on the position of the Mortgagor and the Tenants of the Property respectively while in possession.

	PARAGRAPH
Section I.—Of the Mortgagee's right to possession of Immovable Property	870—908
SUB-SECT. (1).—OF THE EFFECT OF THE MORTGAGEE'S RIGHT IN RELATION TO TENANCIES CREATED BEFORE THE MORTGAGE	873—876
,, (2).—OF THE EFFECT OF THE MORTGAGEE'S RIGHT WHERE THE MORTGAGOR REMAINS IN POSSESSION WITHOUT EXPRESS PROVISION	877—891
,, (3).—OF THE EFFECT OF THE MORTGAGEE'S RIGHT IN RELATION TO TENANCIES CREATED AFTER THE MORTGAGE AND BEFORE JANUARY 1ST, 1882	892—905
,, (4).—OF THE EFFECT OF THE MORTGAGEE'S RIGHT IN RELATION TO TENANCIES CREATED AFTER THE MORTGAGE AND SINCE DECEMBER 31ST, 1881	906—908
,, II.—Of the Mortgagee's right to Possession of Movable Property	909—924
SUB-SECT. (1).—OF THE EFFECT OF THE MORTGAGEE'S RIGHT ON MORTGAGOR AND PERSONS CLAIMING THROUGH HIM	909—914
,, (2).—OF THE PRESERVATION AND USER OF THE PLEDGED OR MORTGAGED CHATTELS	915—924

SECTION I.

Of the Mortgagee's right to Possession of Immovable Property.

<i>Mortgagee in absence of contrary agreement may enter into possession immediately</i>	<i>870</i>
<i>Rights of mortgagee out of possession against persons in possession</i>	<i>871</i>
<i>Mortgagor cannot set up jus tertii</i>	<i>872</i>

SUB-SECTION (1).—Of the effect of the Mortgagee's right in relation to Tenancies previous to the Mortgage.

<i>Mortgagee entitled to demand rents</i>	<i>873</i>
<i>Until Mortgagee intervenes mortgagor retains all rights of landlord</i>	<i>874</i>
<i>After notice to tenant mortgagee has all rights of landlord</i>	<i>875</i>
<i>Rent of furnished house apportionable</i>	<i>876</i>

Paragraph 870 SUB-SECTION (2).—*Of the effect of the Mortgagee's right where the Mortgagor remains in possession.*

	PARAGRAPH
<i>Mortgagor only holds during mortgagee's pleasure</i>	877
<i>Mortgagor not tenant at will within Statute of Limitations</i>	878
<i>Where mortgage expressly provides for mortgagor's continued possession for term certain there is an implied tenancy</i>	879
<i>Express tenancy inconsistent with mortgage not allowed</i>	880
<i>Where tenancy exists mortgagor may be summarily evicted</i>	881
<i>Right of distress where mortgagor attorns tenant to mortgagee</i>	882
<i>In attornments rent must be reasonable</i>	883
<i>Attornments in mortgages since 1878 are bills of sale</i>	884
<i>Where tenancy created, mortgagee may still evict qua mortgagee</i>	885
<i>Tenancy not created by mere power of distress for interest</i>	886
<i>Reservation of yearly rent will not necessarily create yearly tenancy</i>	887
<i>Where tenancy created it survives for benefit of mortgagee's devisees</i>	888
<i>Separate attornments by several tenants in common</i>	889
<i>How tenancy of mortgagor determined</i>	890
<i>Application of County Court Acts to ejectment of mortgagors</i>	891

SUB-SECTION (3).—*Of the effect of the Mortgagee's right in relation to Tenancies created after the security and before January 1st, 1882.*

<i>Tenant liable to be ejected by mortgagee ; his remedy against mortgagor ..</i>	892
<i>Double liability of tenant</i>	893
<i>Mortgagee cannot claim mesne profits</i>	894
<i>Effect of mortgagee recognizing occupier as his tenant</i>	895
<i>Mortgagee cannot distrain until tenant has attorned</i>	896
<i>Lease contemporaneous with mortgage</i>	897
<i>Until mortgagee intervenes the tenancy is good</i>	898
<i>Mortgagor's interest as landlord passes to his heir</i>	899
<i>Proper plea by tenant who has had to pay rent to mortgagee</i>	900
<i>Doctrine of estoppel as between mortgagor and tenant inapplicable to action for breach of covenant after determination of lease</i>	901
<i>Mortgagor with power to lease may let to trustee for himself</i>	902
<i>Prior to 1882 mortgagee could not lease property</i>	903
<i>Where lease by mortgagee is confirmed landlord is owner of legal reversion ..</i>	904
<i>Effect of a joint lease by both</i>	905

SUB-SECTION (4).—*Of the effect of the Mortgagee's right in relation to Tenancies created after the security and since December 31st, 1881.*

<i>Certain leases made by party in possession are now valid</i>	906
<i>Effect of leases granted under statutory power</i>	907
<i>Suggested modifications of power to be inserted in mortgages</i>	908

Mortgagee in absence of contrary agreement may enter into possession immediately.

870. After the execution of the mortgage, the mortgagor is usually allowed to retain possession of the property, until, upon default in payment of interest, the mortgagee finds it necessary to use the remedies given him by the security. A right to this possession is sometimes specially secured to the mortgagor, and the wording of the implied statutory covenants for title in s. 7 of the Conveyancing

and Law of Property Act, 1881, seems to assume that such a right is given. However, it is not very usual to reserve such a right in modern mortgages, and in the absence of such a provision, the legal mortgagee may enter immediately after the execution of the mortgage, by virtue of the estate thereby vested in him (a). Under the Land Transfer Act, 1875 (subject to any entry to the contrary on the register), the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him under the charge at any time during the continuance thereof, enter upon the land charged or any part thereof, or the receipt of the rents and profits thereof, subject to the right of any registered prior incumbrancers, and to the liability of a mortgagee in possession (b) (1742, 1764).

Paragraphs
870—872

Under these various circumstances, the mortgagee's position towards the mortgagor, or other persons in the actual possession of the mortgaged property, under tenancies commencing either before or after the date of the mortgage, sometimes becomes the subject of doubtful and difficult questions.

871. The rights of the mortgagee under these circumstances will be considered,

Rights of
mortgagee
out of
possession
against
persons in
possession.

First, as they affect persons claiming under tenancies created before the date of the mortgage, and to which it is, therefore, subject.

Second, as they affect the mortgagor himself, when he remains in possession after the date of the mortgage, either without or with any express provision enabling him to do so in the mortgage deed.

Third, as they affect persons claiming under tenancies, or other interests created by the mortgagor, after the date of the security, before and since the Conveyancing and Law of Property Act, 1881.

872. And it is to be noted with respect to the second and third of these divisions of the subject, that as no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person, even though the latter may have a right to recover possession (c); and it makes no difference where the mortgagors are trustees, acting in a public capacity, and not for their own benefit (d). But a subsequent mortgagee, who has acquired the legal estate without notice of a prior equitable mortgage, may set it up notwithstanding it was

Mortgagor
cannot set up
jus tertii.

(a) See *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553. But a mere power to sell on default does not give a right to enter before sale (*Watson v. Waltham*, 2 Ad. & E. 485).

(b) 38 & 39 Vict. c. 87, s. 25.

(c) Per Lord MANSFIELD, *Doe d. Bristow v. Pegge*, 1 T. R. 758, n.

(d) *Doe d. Levy v. Horne*, 12 L. J. Q. B. 72; notwithstanding dictum in *Fairtitle v. Gilbert*, 2 T. R. 171, explained *id.*

Paragraphs
872—874 acquired by the mortgagor under whom he claims, after the execution of the prior security (e).

SUB-SECTION (1).—*Of the effect of the Mortgagee's right in relation to Tenancies previous to the Mortgage.*

Mortgagee
entitled to
demand
rents.

873. By the conveyance the reversion passes to the mortgagee, and with it the right to receive the future rents, and the other rights incident to the estate which theretofore belonged to the mortgagor (f). The tenant may nevertheless safely pay the rent of the mortgagor (provided it be rent due and not a payment by anticipation on account of rent (g)), so long as he is allowed by the mortgagee to receive it; for though the conveyance is effectual, as to the grantor's rights against the tenant, without any attornment (h) by the latter, the tenant is not prejudiced by payment of the rent to the grantor, or by breach of any condition for non-payment of rent before notice of the grant (i).

Until
mortgagee
intervenes
mortgagor
retains all
rights of
landlord.

874. By sect. 25, sub-sect. (5) of the Judicature Act, 1873 (k), it was enacted that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." This sub-section, however, only means that so long as a mortgagor is allowed to remain in possession he may recover his rents or as against trespassers may

(e) *Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278. But legal estoppel does not arise either by a mere grant or covenant for title, or without a distinct statement that the grantor has the legal title. *Heath v. Crealock*, L. R. 10 Ch. 22; *General Finance, etc., Co. v. Liberator, etc., Building Society*, 10 Ch. D. 15; *Onward Building Society v. Smithson*, [1893] 1 Ch. 1.

(f) *Trent v. Hunt*, 9 Ex. 14; per Lord DENMAN in *Rogers v. Humphreys*, 4 Ad. & El. 299. Arrears of rent do not pass without express words. *Salmon v. Dean*, 3 Mac. & G. 344.

(g) *De Nicholls v. Saunders*, L. R. 5 C. P. 589; *Cook v. Guerra*, L. R. 7 C. P. 132.

(h) 4 Anne, c. 16, s. 9. Attornments made in consequence of some judgment at law, or decree or order of a court of equity, or to any mortgagee after mortgage forfeited, are excepted from the attornments by tenants to strangers, which are made void by 11 Geo. 2, c. 19. The tenant of a mortgagor, who does not give him notice of ejectment brought by the mortgagee to enforce attornment, is not liable to the penalties of s. 12 of the same statute for secreting ejectments. (*Buckley v. Buckley*, 1 T. R. 647.) And a mortgagee is not allowed to come in and defend as a landlord in ejectment under the statute unless he is interested in the result of the suit. *Doe d. Pearson v. Roe*, 6 Bing. 613.

(i) 4 Anne, c. 16, s. 10. But if he pay the rent to the mortgagor, after notice to pay the mortgagee, and is afterwards compelled to pay the latter, the payment, being voluntary, cannot be recovered from the mortgagor. *Higgs v. Scott*, 7 C. B. 63.

(k) See to same effect Judicature Act (Ireland), 1877 (c. 57), s. 28 (5).

recover the possession or obtain an injunction (*l*) without suing the mortgagee. It does not mean that he can do things which might affect prejudicially the mortgagee's interests. Thus it does not enable him to forfeit a lease under a power of re-entry for breach of covenant without the joinder of the mortgagee (*m*), or to enforce a right which would involve the taking of accounts in which the mortgagee is interested (*n*). If in any such case the mortgagee refuses to be a plaintiff he may be made a defendant (*n*); but in that case it would seem that the mortgagor must offer to redeem (*o*). The section does not enable the mortgagee to sue on the covenants in the lease, but he can do so under section 10 of the Conveyancing and Law of Property Act, 1881 (*p*).

Before the above provision was made, the mortgagor, being no longer the owner of the reversion, could not sue a tenant where the tenancy had expired in ejectment (*q*); he might, however, always distrain for the rent, as the bailiff of the mortgagee, under an implied authority from him to enforce payment of the fund out of which his interest may be paid. And even though he distrained as for rent due to himself, he might justify as the bailiff of the mortgagee (*r*). The like authority is implied in favour of the owner of the equity of redemption, who has paid off the mortgage on an undertaking for a transfer of the security (*s*).

By sect. 10 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), it is provided that the rent reserved by a lease made after the commencement of the Act and the benefit of every covenant and provision therein contained . . . and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land or in any part thereof . . . notwithstanding severance of that estate, and shall be capable of being recovered, received, enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part as the case may be, of the land leased. This section seems to be aimed primarily at the difficulties formerly caused by a severance of the reversion. But the Court of Appeal has decided in a recent case (*p*) that a mortgagor in possession is by this section entitled to sue in his own name upon a covenant

(*l*) *Fairelough v. Marshall*, 4 Ex. D. 37.

(*m*) *Matthews v. Usher*, [1900] 2 Q. B. 535; and see *Molyneux v. Richard*, [1906] 1 Ch. 34.

(*n*) *Van Gelder Apsimon & Co. v. Sowerby Bridge United District Flour Society*, 44 Ch. D. 374, 392.

(*o*) See *Hughes v. Cook*, 34 Beav. 407.

(*p*) *Turner v. Walsh*, [1909] 2 K. B. 484.

(*q*) *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065.

(*r*) *Trent v. Hunt*, 9 Ex. 14; *Reece v. Strousberg*, 54 L. T. 133.

(*s*) *Snell v. Finch*, 9 Jur. (N.S.) 333.

Paragraphs to repair contained in a lease made before the mortgage but after
 874—877 the date of the Act.

After notice
 to tenant
 mortgagee
 has all rights
 of landlord.

875. On the other hand, if the mortgagee takes possession or gives notice (*u*) to the tenant holding under a tenancy prior to the mortgage, his title relates back to the date when his right first accrued. Thus he can sue a trespasser for a trespass committed before he took possession (*x*); and, on similar grounds, he becomes entitled to, and may distrain or sue for, the rent in arrear since the mortgage, and also for that which subsequently accrues (*y*); and this whether the tenant holds under a lease, or from year to year. Or he may sue a tenant claiming under an agreement for a lease made by the mortgagor for use and occupation (*z*); and even if, after the mortgage, the terms of the holding have been varied as to the amount of rent by agreement between the tenant and the mortgagor; such an agreement being considered not to alter the relative positions of the mortgagee and the tenant, but to be adopted by the former as the act of an agent, and to entitle him to recover the additional as well as the original rent (*a*). The mortgagor, after the mortgagee has taken possession, has no remedy in equity against the tenant in respect of rent alleged to be due from him (*b*); not even where the mortgagee has refused to apply for it (*c*). In the latter case, his only remedy is against the mortgagee on taking the accounts.

Rent of
 furnished
 house appor-
 tionable.

876. As to property to which the mortgagee has no claim (as furniture in a mortgaged house, which has become vested in the mortgagor's assignees in bankruptcy), if the tenant of a house and furniture, after notice from the mortgagee, pay him the *whole* rent, the tenant may be sued again for the use of the furniture in which the mortgagee had no interest (*d*); for either the rent may be apportioned, or, upon the entry of the mortgagee, a new agreement may be inferred by the jury, for the letting of the different kinds of property at several rents.

SUB-SECTION (2).—*Of the effect of the Mortgagee's right where the Mortgagor remains in possession.*

Mortgagor
 only holds
 during

877. This relation has been the subject of much discussion, arising less from any real question as to the relative rights of the

(*u*) But he cannot charge as mortgagee's costs for the expense of drafting more than one notice, however many tenants there may be (*Re Tweedie*, 53 Sol. J. 118).

(*x*) *The Ocean Accident and Guarantee Corporation v. The Ilford Gas Co.*, [1905] 2 K. B. 493.

(*y*) *Moss v. Gallimore*, 1 Dougl. 279.

(*z*) *Rawson v. Eicke*, 7 Ad. & El. 451.

(*a*) *Burrowes v. Gradin*, 1 Dowl. & L. 213.

(*b*) *Underhay v. Read*, 36 W. R. 75, affirmed 36 W. R. 298, and 20 Q. B. D. 209.

(*c*) *Salmon v. Dean*, 14 Jur. 235.

(*d*) *Salmon v. Matthews*, 8 Mee. & W. 827.

parties, than from the embarrassment caused by the technical effect of the words by which the relation has been attempted to be defined—an embarrassment which has led one learned judge to declare, that it was very dangerous to define the precise relation in which the mortgagor and mortgagee stand to each other in any other terms than those very words (*e*); another, that one is much at a loss as to the proper terms in which to describe the relation (*f*); and a third, that it is sufficient to call them mortgagor and mortgagee, without having recourse to any other description of men, or to what they are most like; their rights, powers and interests being as well settled as any in the law (*g*). It will, therefore, be sufficient to say that the mortgagor in possession, under such circumstances, is not, as he was sometimes called, tenant at will to the mortgagee; seeing that he is not, like a tenant at will (*h*), entitled to the crops growing on the land at the end of the tenancy (*i*), and that he may be ejected without notice or demand of possession (*k*); nor yet the mortgagee's bailiff or receiver, because not obliged to account to him for the rents (*l*). By Lord Mansfield the mortgagor was said to be tenant at will *quodam modo* (*m*); and he has been said to be tenant *by*, as distinguished from tenant *at*, sufferance (*n*); but these definitions barely mark without explaining the distinctions which they imply. The likeness of the mortgagor's interest to that of a tenant at sufferance is so far correct, that it agrees with his position as one who comes in by right, and holds over without right (*o*). But, following the caution of Lord Mansfield, that nothing is more apt to confound than a simile, the mortgagor in possession may be described as one who, having parted with his estate, remains in possession at the pleasure and consistently with the right of the grantee, exercising the ordinary rights of property; including the right of holding courts where lord of a manor (*p*); receiving rents for his own use; entitled by statute to vote in respect of the mortgaged property, in elections for knights of the

Paragraph
877

mortgagee's
pleasure.

(*e*) *Per* Lord DENMAN, *Doe d. Higginbotham v. Barton*, 11 Ad. & E. at p. 314.

(*f*) *Per* PATTERSON, J., *Doe d. Jones v. Williams*, 5 Ad. & E. at p. 297.

(*g*) *Per* BULLER, J., *Birch v. Wright*, 1 T. R. at p. 383.

(*h*) See *Exp. Temple*, 1 G. & J. 216, where the mortgagor was held entitled to the crops as tenant at will by express contract.

(*i*) *Re Gordon*, 61 L. T. 299, a case where the mortgagor's trustee in bankruptcy claimed crops.

(*k*) See *per* BULLER, J., *Birch v. Wright*, 1 T. R. at p. 383; *per* Lord TENTERDEN, *Doe d. Roby v. Maisey*, 8 B. & C. 767.

(*l*) *Birch v. Wright*, 1 T. R. at p. 383.

(*m*) *Moss v. Gallimore*, 1 Dougl. at p. 282.

(*n*) See also *Keech v. Hall*, 1 Dougl. 21, and *Moore v. Shelley*, 8 App. Cas. 284.

(*o*) Lord ELLENBOROUGH, *Thunder d. Weaver v. Belcher*, 3 East, 449; Lord TENTERDEN, *Doe d. Roby v. Maisey*, 8 B. & C. 767; 1 Smith's L. C., note to *Keech v. Hall*. See *Doe d. Fisher v. Giles*, 5 Bing. 421; *Bagnall v. Villar*, 12 Ch. D. 812; *Heath v. Pugh*, 6 Q. B. D. 345, 359.

(*p*) 1 Scriven, 73, n. ed. 5.

Paragraphs
877—879

shire and other members to serve in Parliament (*q*); able to bring an action in respect of the mortgaged property against any one save the mortgagee (*r*); and to make agricultural or occupation and building leases subject to certain restrictions (*s*); yet liable at the option of the mortgagee to be treated either as a tenant or as a trespasser; in the one character to be sued for injuring the reversion (*t*); in the other to be ejected without notice, demand of possession, or claim to rents in arrear or accruing, or to the growing crops (*u*).

Mortgagor
not tenant at
will within
Statute of
Limitations.

878. The Statute of Limitations provides that the mortgagor shall not be deemed to be the tenant at will of the mortgagee, within the meaning of the enactment that when any person shall be in possession or receipt of the rents and profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action, shall be deemed to have first accrued at the determination or at the expiration of one year next after the commencement of such tenancy (*x*). But the proviso does not exclude from the enactment the right of action of a mortgagee who has been paid off but has not reconveyed; because, by the payment, the relation of mortgagor and mortgagee ends, and the latter being a mere tenant at will is within the limitation (*y*).

Where
mortgage
expressly
provides for
mortgagor's
continued
possession
for time

879. We have next to consider those cases in which the mortgagor remains in possession under the express provisions of the security, and the effect created by any special remedies thereby given to the mortgagee against the rents of the estate. Sometimes a mere power is given to the mortgagee to enter and receive the

(*q*) 8 Hen. 6, c. 7; 2 & 3 Will. 4, c. 45, s. 23; 6 & 7 Vict. c. 18, s. 74. The monthly payments secured by mortgage to trustees of a benefit society under 6 & 7 Will. 4, c. 32, are a charge on the estate which will destroy the owner's right to vote, if they do not leave him the quantity of interest prescribed by statute. (*Copland v. Bartlett*, 6 C. B. 18.) The mortgagor in possession is also a person who hath or holdeth lands or tenements within the Statute of Sewers (23 Hen. 8, c. 5, s. 3), and may be fined for the non-repair of seabanks. (*R. v. Baker*, L. R. 2 Q. B. 621.) On the other hand, the mortgagor of an undivided share of land cannot sue for partition without first redeeming. *Sinclair v. James*, [1894] 3 Ch. 554.

(*r*) *Sellick v. Smith*, 11 Moo. 459 (as to mortgagor of patent suing an infringer without joining the mortgagee, see *infra*, 914); Judicature Act, 1873 (c. 66), s. 25 (5). The section only applies where the mortgagor could not, either in his own name or in conjunction with the mortgagee, have brought an action. (*Per BRAMWELL, L.J.*, in *Fairclough v. Marshall*, 4 Ex. D. at p. 45.) But query if there is sufficient reason for thus limiting the effect of the enactment. As to mortgagor of a patent suing for infringement without joining the mortgagee, see *Van Gelder Apsimon & Co. v. Sowerby Bridge United District Flour Society*, 44 Ch. D. 347.

(*s*) Conveyancing Act, 1881, c. 41, s. 18.

(*t*) *Partridge v. Bere*, 5 B. & Ald. 604; *Hitchman v. Walton*, 4 Mee. & W. 409.

(*u*) *Doe d. Roby v. Maisey*, 8 B. & C. 767; *Trent v. Hunt*, 9 Ex. 14; *Doe d. Higginbotham v. Barton*, 11 Ad. & El. 307; *Doe d. Fisher v. Giles*, 5 Bing. 421; *Doe d. Griffith v. Mayo*, 7 L. J. (o.s.) K. B. 84; *Jolly v. Arbuthnot*, 4 De G. & J. 224; *Bagnall v. Villar*, 12 Ch. D. 812; *Re Gordon*, 61 L. T. 299.

(*x*) 3 & 4 Will. 4, c. 27, s. 7.

(*y*) *Sands to Thompson*, 22 Ch. D. 614.

profits of the land, which is in truth no more than the mortgagee may do under the conveyance (z); but old mortgages also often contain a power of distress; and provisions, under which, either directly or constructively, the relation of landlord and tenant is created between the mortgagor and mortgagee. A simple instance of a constructive tenancy arises where there is a provision that the mortgage shall not be called in till the expiration of a given term, and that until default in payment it shall be lawful for the mortgagor and his heirs peaceably to enjoy and receive the rents (a); this amounts to a re-demise by the mortgagee to the mortgagor during the term fixed. The result is not the same where the covenant is, that the mortgagee may enter *after* default, which is held not to imply that the mortgagor may remain in possession *until* default, but only to leave the mortgagee up to that period to rest upon his title under the conveyance, and afterwards to give him also the benefit of the covenant (b). In considering these questions the courts have been guided by the authority of Sheppard's Touchstone, in which it is laid down (c), that "if A. bargain to sell his land to B. on condition to re-enter if he pay him 100*l.*, and B. doth covenant with A. that he will not take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease;" for want, adds Mr. Preston, of a more formal contract, and also for want of certainty of time. "And if the mortgagee covenant with the mortgagor, that he will not take the profits of the land, until the day of payment of the money, in this case, albeit the time be certain, yet this is no good lease but a covenant only;" since, says the learned editor, the words are negative only and not affirmative.

Paragraph
879

certain there
is an implied
tenancy.

Therefore, though the words used imply some right of possession in the mortgagor, they will not amount to a re-demise to him unless, as in *Wilkinson v. Hall*, cited above, some certain time be fixed during which the mortgagor is to hold (d). So that no

(z) See *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553.

(a) *Wilkinson v. Hall*, 3 Bing. N.C. 508.

(b) *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553; *Rogers v. Grazebrook*, 8 Q. B. 895. So the distinction has been taken, that under a proviso that the mortgagee shall not meddle with the possession of the premises or the receipt of rent till default of payment, the mortgagor is only tenant at sufferance, but tenant at will under a covenant that he should take the profits until default of payment. *Powsely v. Blackman*, Cro. J. 659.

(c) Vol. 2, 272.

(d) *Doe d. Parsley v. Day*, 2 Q. B. 147; 2 G. & D. 757, explaining *Wheeler v. Montefiore*, 2 Q. B. 133, which was an action of trespass by a mortgagee by way of underlease against the sheriff, who entered under an execution against the mortgagor, and pleaded that plaintiff was not possessed. There was a proviso for redemption on a certain day, and that on non-payment the plaintiff might enter, but no covenant that the mortgagee might remain in possession till the day fixed. The verdict was for the plaintiff, which was afterwards held to be wrong; and it was said that his right to possession did not accrue till the day fixed for redemption, which implied a right in the mortgagor till that time; but the reason was also given, and is now taken to have been the ground of the decision, that a lessee before entry cannot maintain *trespass*.

Paragraphs
879—882

demise is created by a covenant that the mortgagee shall not sell or lease without a month's notice demanding payment and default thereon; and for want of this certainty, doubt has been cast upon a decision in which, on mortgage by husband and wife of her land to secure an annuity, upon trust to permit her to receive the rents, until default for sixty days in payment of the annuity, the estate was held to have been re-demised to the mortgagor until default (*e*). And apparently on the same principle, where upon or after default the mortgagor was to hold of the mortgagee as tenant, it was held that the mortgagee could not distrain for rent without first giving the mortgagor notice of the intention to treat him as a tenant (*f*).

Express
tenancy
inconsistent
with
mortgage not
allowed.

880. Although a tenancy may be created by sufficient words in the deed, it will not be allowed where the effect would be inconsistent with the general object of the deed. Such an inconsistency was held to arise, where the object of the deed being to secure certain payments, the grantors were to retain possession and take the rents until default; and yet it was provided that they should hold as tenants at will to the mortgagee at a rent, subject to a power of re-entry in case of non-payment, and to all usual covenants and remedies in leases; and the latter provision was rejected because it would have subjected the mortgagors to a distress for rent, before default in payment of the debt intended to be secured, and even before that debt became due (*g*).

Where
tenancy
exists
mortgagor
may be
summarily
evicted.

881. Where the relation of landlord and tenant is created by a mortgage deed, the mortgagee can obtain judgment for the recovery of the land from the mortgagor in possession by summary process under Order III., r. 6, and Order XIV. Rules Supreme Court (*h*).

Right of
distress
where
mortgagor
attorns
tenant to
mortgagee.

882. Under a tenancy created by an attornment, or agreement, made prior to 1879, there may be a right of distress, by force of the intention of the parties, or by estoppel; though it appear on the face of the deed that the person to whom the mortgagor attorned being a mere receiver, or not in possession of the legal estate, has no reversion to which the power of distress could

(*e*) *Doe d. Lyster v. Goldwin*, 2 Q. B. 143. See also *Gale v. Burnell*, 7 Q. B. 850.

(*f*) *Clowes v. Hughes*, L. R. 5 Ex. 160.

(*g*) See *Walker v. Giles*, 6 C. B. 662, as explained in cases cited below; *Pinhorn v. Souster*, 8 Ex. 763. And see remarks on *Walker v. Giles*, in *Turner v. Barnes*, 2 B. & S. 435, where it was held, that, assuming the tenancy created to be a tenancy at will, and therefore to have ceased at the death of the mortgagor, the mortgagee was not justified in distraining afterwards upon his widow who remained in occupation; it being necessary, under the statute 8 Anne, c. 14, s. 7, to distrain during the possession of the tenant from whom the arrears became due, and that the wrongful distress did not become good by relation when the widow afterwards became the administratrix of the mortgagor.

(*h*) *Daubuz v. Lavington*, 13 Q. B. D. 347; and see *Mumford v. Collier*, 25 Q. B. D. 279; and *Kemp v. Lester*, [1896] 2 Q. B. 162.

be incident ; and though the holder of the legal estate be no party to the deed (*i*). Paragraphs
882—884

It follows that a mortgagor may attorn to a second mortgagee after he has attorned to the first, and both may distrain even after the bankruptcy of the mortgagor, if the rents are not fraudulent under the law of bankruptcy (*j*). Where, however, the mortgagee of a joint stock company in liquidation desires to distrain under an attornment clause, leave to do so will not readily be given (*k*).

As to the application of the fruits of a distress see (1453).

883. The rent at which the mortgagor attorned tenant, must have been reasonable as regards the yearly value of the property. If the amount were so large as to be out of all proportion to the value of the estate for use and occupation—still more, if it be so large that one payment would determine the tenancy, by putting an end to the mortgage—the inference is very strong that the intention was not to create a tenancy, but was a device to give the mortgagee an additional security in case of the mortgagor's bankruptcy, and was a fraud upon the bankruptcy law ; and the mortgagee will not be allowed to distrain under the 42nd section of the Bankruptcy Act, 1883 (*l*). In attornments rent must be reasonable, otherwise fraud on bankruptcy law.

It is not an objection to an attornment (where the rent is not so large as to make the transaction void on that account), that it is or may be of a variable amount, or that where not executed by both parties it is only a tenancy at will under the Statute of Frauds, so that no distress can be made after the bankruptcy, because it does not of necessity exceed the term of three years ; or that for want of execution by the mortgagee there is no agreement for a tenancy ; because the execution of the deed by the mortgagor and its delivery to the mortgagee create a tenancy by estoppel (*m*).

884. With regard to attornments in mortgage deeds executed since December 31st, 1878, s. 6 of the Bills of Sale Act of that year enacts that “every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed Attornments in mortgages since 1878 are bills of sale.

(*i*) *Jolly v. Arbuthnot*, 28 L. J. Ch. 547 ; *Morton v. Woods*, L. R. 4 Q. B. 293. *Kearsley v. Phillips*, 11 Q. B. D. 621.

(*j*) *Exp. Punnett, Re Kitchen*, 16 Ch. D. 226.

(*k*) See *Re Lancashire Cotton Spinning Co., Re Carnelley*, 35 Ch. D. 656.

(*l*) *Exp. Williams, Re Thompson*, 7 Ch. D. 138 ; *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335 ; *Exp. Jackson, Re Bowes*, 14 Ch. D. 725 ; *Exp. Voisey, Re Knight*, 21 Ch. D. 442 ; under the corresponding s. 34 of the Act of 1869.

(*m*) *Exp. Voisey, Re Knight, supra*.

Paragraphs
884—886

to be a bill of sale within the meaning of this Act of any personal chattels which may be seized or taken under any such power of distress. Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, *being in possession*, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.” For the effect of this section on the validity of attornment clauses the reader is referred to Part II., Chapter III. (83). It may, however, be stated here that such a clause, where void under the Act, is only void with regard to the personal chattels seized under a distress, and is not void so as to defeat the relation of landlord and tenant (*n*).

Where
tenancy
created,
mortgagee
may still
evict *qua*
mortgagee.

885. Notwithstanding the existence of apt words for the creation of a tenancy, the mortgagee may retain his ordinary power of ejectment, *qua* mortgagee, if his ordinary rights be reserved. Therefore, where, in one case (*o*), a yearly rent was reserved, not exactly corresponding with the interest, with power for the mortgagee to use such remedies as landlords have on common demises (the expressions used being properly applicable to cases of landlord and tenant); and in another (*p*), where the mortgagor, by the deed, attorned tenant to the mortgagee at a rent, a proviso in the first that the right to enter and evict the mortgagor after default should not be prejudiced by the reservation of rent, and in the latter a power of re-entry in case of default, were held to entitle the mortgagee to eject the mortgagor without notice to quit or demand of possession; though in one case the mortgagee by distraining had treated the mortgagor as his tenant (*q*).

Tenancy not
created by

886. A tenancy between the mortgagor and mortgagee is not created (*r*) by the mere grant of a power to the mortgagee to

(*n*) *Mumford v. Collier*, 25 Q. B. D. 279; and see *Daubuz v. Lavington*, 13 Q. B. D. 347.

(*o*) *Doe d. Garrod v. Olley*, 12 Ad. & El. 481.

(*p*) *Doe d. Snell v. Tom*, 4 Q. B. 615.

(*q*) In cases arising out of the same transaction which came before the Courts of Queen's Bench and Exchequer, and in which the mortgagee had a power of entry on default, the mortgagor attorned to the mortgagee as tenant from year to year at a rent, to the intent that he might have, for recovery of interest, the same powers of entry and distress as by law are given to landlords for recovery of rent in arrear; the mortgagor remained in possession for more than a year, and the mortgagee after default assigned. It was held in the Queen's Bench in trespass, that the mortgagee could not, after assignment, enter and distrain for arrears of interest due before assignment, the deed not creating a mere licence to seize, but a tenancy, under which there could be no distress after conveyance. But the Court of Exchequer held, that the tenancy from year to year, if any were created, was only for the purpose of giving a right to distrain, and that the whole matter was overridden by the mortgagee's right of entry. (See *Brown v. Metropolitan Life Assurance Society*, 28 L. J. Q. B. 236, and *Metropolitan Life Assurance Society v. Brown*, 28 L. J. Ex. 340.) The result appears to be, that however convenient may be the powers of distress and tenancy clauses, they should always be accompanied by, and made subject to, a special right of entry on default.

(*r*) *Doe d. Wilkinson v. Goodier*, 10 Q. B. 957.

distrain for interest in arrear which may be given whether the mortgagee have or have not the legal estate, he being in possession (s), even though he be empowered to distrain as for rent reserved by lease; the word "rent" in such a case not requiring the existence of a tenancy, but being used only to direct the mode of dealing with the distress. The grant may operate as a rent-charge where the estate is not conveyed by the security, or vested in the mortgagee, as in the case of a covenant to surrender copyholds; but upon the admittance of the mortgagee, the rent-charge will necessarily cease, and the grant will thenceforth operate only as a covenant, enabling the mortgagee to seize such goods as are on the premises when the distress is made, and to treat them as if distrained (t).

Paragraphs
886—888

mere power
of distress
for interest.

887. The nature of the tenancy will depend upon the language and intention of the deed; and the reservation of a yearly rent will not necessarily create a tenancy from year to year. A covenant for quiet enjoyment by the mortgagee, as tenant at will to the mortgagee, on payment of a yearly rent, will create only a tenancy at will at a yearly rent, though coupled with a proviso that no possession should be taken till the expiration of twelve months after notice of such intention to the mortgagee: no certain term being thereby created (u). And an agreement by the mortgagee to become tenant during the will and pleasure of the mortgagee, at a rent payable on certain days in every year, will also create a tenancy at will, with rent payable at the rate of so much a year (x). The same effect has been said to be produced by a power in the mortgagee to enter at any time without notice, although the tenancy was nominally created for a term of years (y). But it has been explained that by this decision it was not meant that a tenancy at will in the strict legal sense had arisen, but a tenancy for a term limited by the fixed number of years, and determinable at the will of the mortgagee (z).

Reservation
of yearly
rent will not
necessarily
create yearly
tenancy.

888. Where the estate was devised by the mortgagee, to whom the mortgagee had attorned tenant at a rent, and the mortgagee remained in possession and paid rent, the subsequent occupation connected with the provisions of the deed, was held (a) to constitute the relation of landlord and tenant, and to entitle the devisees to

Where
tenancy
created it
survives for
benefit of
mortgagee's
devisees.

(s) *Chapman v. Beecham*, 3 Q. B. 723. It seems that a mere personal licence to distrain cannot be transferred. (*Brown v. Metropolitan Life Assurance Society*, 28 L. J. Q. B. 236.)

(t) *Freeman v. Edwards*, 2 Ex. 732.

(u) *Doe d. Dixie v. Davis*, 7 Ex. 89.

(x) *Doe d. Bastow v. Cox*, 11 Q. B. 122.

(y) *Morton v. Woods*, L. R. 4 Q. B. 293.

(z) *Re Threlfall, Exp. Queen's Benefit Building Society*, 16 Ch. D. 274.

(a) *West v. Fritche*, 3 Ex. 216.

Paragraphs 888—892 distrain, though receipts for the rent were given as interest, and the deed was executed by the mortgagor only.

Separate
attornments
by several
tenants in
common.

889. Under separate attornments by mortgagors (who are partners) in respect of their undivided moieties, the mortgagee cannot by means of simultaneous distresses upon the goods of each of them, take such as belong to them in common (*b*).

How tenancy
of mortgagor
determined.

890. The mortgagor cannot determine the tenancy at will, by transferring his interest to another, without notice to the mortgagee, so as to affect his right to distrain (*c*); but the death of the mortgagor determines it, and his heir is not tenant to the mortgagee (*d*). And it seems that a tenancy at will which existed before the mortgage will not be determined by the mortgage (*e*).

Application
of County
Court Act to
ejectment of
mortgagors.

891. The County Courts Act, 1888, which enables (*f*) landlords to recover possession (in county courts) of small tenements, only contemplates (*g*) the ordinary case of landlord and tenant, and is, therefore, not applicable to that of mortgagor and mortgagee, unless a tenancy have been actually created between them. But all actions of ejectment where neither the value nor rent of the property shall exceed 50*l.* by the year, may be brought and prosecuted in the county court of the district in which the lands, tenements or hereditaments are situate (*h*).

SUB-SECTION (3).—*Of the effect of the Mortgagee's right in relation to Tenancies created after the security, where the latter is dated before January 1st, 1882.*

Tenant liable
to be ejected
by mortgagee.
His remedy
against
mortgagor.

892. The mortgagor, being unable to confer upon another a greater right than he himself possesses, his tenant claiming under a demise of whatever kind, made after the mortgage, without the privity of the mortgagee, was (and in cases outside s. 18 of the Conveyancing and Law of Property Act, 1881 (**906**), still remains), like his lessor, liable to be ejected without notice; and he had no remedy but against the mortgagor (*i*), whom a Court of Equity would not compel to pay off the mortgage for the purpose of perfecting the lease. The lessee in such a case was formerly left to his remedy at law, but was afterwards given damages in equity, unless it appeared that he came into equity only for damages,

(*b*) *Exp. Parke, Re Potter*, L. R. 18 Eq. 381.

(*c*) *Pinhorn v. Souster*, 8 Ex. 763.

(*d*) *Scobie v. Collins*, [1895] 1 Q. B. 375.

(*e*) *Doe d. Goody v. Carter*, 9 Q. B. 863.

(*f*) 51 & 52 Vict. c. 43, ss. 138—141.

(*g*) *Jones v. Owen*, 13 Jur. 261.

(*h*) 51 & 52 Vict. c. 43, s. 59.

(*i*) *Keech v. Hall*, 1 Dougl. 21; *Thunder d. Weaver v. Belcher*, 3 East, 449; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454. *Per* Lord DENMAN in *Rogers v. Humphreys*, 4 Ad. & El. 299.

knowing that he had no case for specific performance (*k*). And now under the Tenants Compensation Act, 1890 (53 & 54 Vict. c. 57), a tenant under a tenancy not binding on the mortgagee, is nevertheless given a right against the mortgagee for crops, improvements, tillages, &c. He is also given the right to six months' notice.

Paragraphs
892—895

893. Besides being liable to eviction by the mortgagee, or (if he pay rent to him) to have his own interest reduced at the utmost to that of a tenant from year to year (**895**), the tenant of the mortgagor after the mortgage, if called upon to pay rent to the mortgagor before he has paid it to the mortgagee, is liable to a distress by the former, whose title he is estopped from disputing. To escape from this double liability he is justified in giving up possession to the mortgagee upon his requiring payment of the rent, and threatening to enforce his rights upon refusal; and these acts of the mortgagee amount to a disturbance of the lessee in the enjoyment of the demised property, and an eviction, sufficient to support an action against the mortgagor upon his covenant for quiet enjoyment: the lessee's right to sue being unaffected by the circumstance that he has obtained from the mortgagee compensation for improvements (*l*).

Double
liability of
tenant.

894. But the mortgagee cannot bring trespass for mesne profits against a tenant who has come in after the mortgage, where (*m*) the mortgagee has not been in actual possession of the land. If he have obtained a verdict, or the defendant have suffered judgment by default in ejectment, the production of the record in the action will be evidence of the plaintiff's possession at the time of the demise; and he may recover the mesne profits subsequent to that date: but as to the profits prior to the demise, he must prove such a title, accompanied by possession, as would enable him to maintain an ordinary action of trespass.

Mortgagee
cannot
claim mesne
profits.

895. Nor can the mortgagee distrain or bring an action for rent under such circumstances, so long as the relation of landlord and tenant does not exist between him and the person in possession. If he recognize him as his own tenant he cannot afterwards treat him as a trespasser (*n*); and the effect of the recognition is not to set up a lease for years made by the mortgagor, but to create a new tenancy from year to year between the mortgagee and the lessee (*o*) at the old rent (*p*); but not (in the absence of agreement)

Effect of
mortgagee
recognizing
occupier as
his tenant.

(*k*) *Costigan v. Hastler*, 2 Sch. & Lef. 160; *Howe v. Hunt*, 31 Beav. 420.

(*l*) *Carpenter v. Parker*, 3 C. B. (N.S.) 206.

(*m*) *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932; *Litchfield v. Ready*, 5 Ex. 939.

(*n*) *Birch v. Wright*, 1 T. R. 378.

(*o*) *Doe d. Hughes v. Bucknell*, 8 Car. & P. 566; *Partington v. Woodcock*, 5 Nev. & M. 672; and see *Corbett v. Plowden*, 25 Ch. D. 678; and *Brown v. Peto*, [1900] 1 Q. B. at p. 356, and [1900] 2 Q. B. 653.

(*p*) *Corbett v. Plowden*, *supra*.

Paragraphs on the other terms of the lease so far as applicable to a yearly
895—898 tenancy (*q*).

Mortgagee
 cannot
 distrain until
 tenant has
 attorned.

896. Neither a mere notice to the tenant, requiring him to pay rent to the mortgagee, without an attornment or other evidence of consent by the tenant, nor an authority to him from the mortgagor to pay rent to the mortgagee, though communicated to and acted upon by the tenant, will make him the tenant of the mortgagee, or entitle the latter to distrain for the subsequent rent (*r*); and a subsequent attornment by the tenant will not set up the mortgagee's title by relation from the time at which a previous notice was given (*s*). Nor is the change of tenancy established only by proof of payment of interest, as such, by the person in possession of the land (*t*). But it has been held to be effected if the mortgagee, or his agent, call on the mortgagor's tenant to pay, and he actually pays, the interest of the mortgagee, instead of rent to the mortgagor (*u*). And the recognition of the tenancy is a matter of evidence, and may be inferred from other acts—as, it seems, by a notice to the tenant to quit at the expiration of his tenancy (*x*), or if the mortgagee encourage the tenant to lay out money on the property (*y*). But where the mortgagor leased to a person who laid out money on improvements, it was held that the occasional inspection by the mortgagee of the improvements was not sufficient evidence of his acceptance of the lessee as his tenant (*z*).

Lease con-
 temporaneous
 with
 mortgage.

897. Where the lease was neither prior, nor subsequent to, but contemporaneous with, the mortgage (because made under a power created by the same instrument), it was held that the notice of the mortgagee to the tenant in possession, entitled him to rents due at the time of the notice, and gave a right to distrain for them (*a*).

Until
 mortgagee
 intervenes
 the tenancy
 is good.

898. Although the subsequent lease be thus void as against the mortgagee, yet, as the tenant cannot dispute his landlord's title, the lease will be good against him until the mortgagee interferes (*b*); until which time the mortgagor may receive the rent for his own use, and may even distrain for it when unpaid.

And the tenant's interest by estoppel may be converted into a

(*q*) *Keith v. Ganzia & Co., Ltd.*, [1904] 1 Ch. 774.

(*r*) *Evans v. Elliot*, 9 Ad. & El. 342; *Wheeler v. Branscombe*, 5 Q. B. 373; *Hickman v. Machin*, 5 Jur. (N.S.) 576. And see *Doe d. Downe v. Thompson*, 9 Q. B. 1037; and *Towerson v. Jackson*, [1891] 2 Q. B. 484.

(*s*) *Evans v. Elliot*, 9 Ad. & El. 342.

(*t*) *Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473.

(*u*) *Doe d. Whitaker v. Hales*, 7 Bing. 322.

(*x*) *Smith v. Eggington*, L. R. 9 C. P. 145, *per* KEATING and GROVE, JJ.

(*y*) *Evans v. Elliot*, *supra*, *per* Lord DENMAN; *Keech v. Hall*, 1 Dougl. 21, *per* Lord MANSFIELD.

(*z*) *Doe d. Parry v. Hughes*, 11 Jur. 698.

(*a*) *Rogers v. Humphreys*, 4 Ad. & El. 299.

(*b*) *Trent v. Hunt*, 9 Ex. 14.

lease in interest, by the conveyance of the mortgagee; so that a purchaser from the mortgagor will under such circumstances have a remedy against the lessee after the mortgage, on his covenants (c). Paragraphs
898—900

But where a mortgagor entered into an agreement to grant a lease, and, before it was granted, the mortgagees notified the tenant (who was in possession) to pay all future rents to them, which he did, and gave them six months' notice to determine his tenancy, it was held that the notice by the mortgagees, and payment by the tenant in accordance with it, did away with the agreement for a lease, and made the tenant a tenant from year to year to the mortgagees, and that specific performance of the agreement could not be decreed at the suit of the mortgagor and mortgagees (d).

899. The mortgagor's interest by estoppel also passes by descent to his heir, and by purchase to an assignee, who may sue the tenant upon the covenants in the lease; and this although the estates of the mortgagor and mortgagee were both equitable, if the terms of the conveyance be sufficient to pass an estate in fee, to which the reversion by estoppel as against the lessee is considered to be equivalent (e). But there is no estoppel where the lease discloses that the land is mortgaged, and that the lessor has only an equity of redemption (f). The lessee's covenants are then only in gross and cannot be sued upon by the assignee of the lessor. And where the assignee of the mortgagor also acquires the legal estate from the mortgagee, who was not privy to or estopped by the lease, the assignee will not be bound by it, though he have received rent from the tenant (g). Mortgagor's
interest as
landlord
passes to his
heir.

900. After the mortgagee has obtained payment of the rent, the tenant, in defending himself against a subsequent action by the mortgagor, is still not allowed to deny the mortgagor's title; he must admit it, and then show that it has been determined, and that he has been compelled to make the payment to the mortgagee (h); or if the payment were by the mortgagor's consent, the plea may be *riens en arrière* (i). A plea of payment to the mortgagee upon his demand, and threat to put the law in force in case of refusal, is Proper plea
by tenant
who has had
to pay rent
to mortgagee.

(c) *Webb v. Austin*, 7 Man. & Gr. 701.

(d) *Corbett v. Plowden*, 25 Ch. D. 678.

(e) *Cuthbertson v. Irving*, 5 Jur. (N.S.) 740. But the tenant is not estopped from disputing the title of an unadmitted mortgagee of copyholds, because estoppel will not operate upon an equitable estate. (*Rayson v. Adcock*, 9 Jur. (N.S.) 800; *Doe d. North v. Webber*, 3 Bing. N. C. 922.)

(f) *Pargeter v. Harris*, 7 Q. B. 708; *Cuthbertson v. Irving*, *supra*. In *Saunders v. Merryweather*, 3 H. & C. 902, it was held, that the assignee of the lease might show that the mortgagor was not the legal owner of the reversion; for though the mortgage did not appear on the face of the assignment of the lease, the latter recited an assignment of the mortgage, which recited the mortgage itself.

(g) *Doe d. Downe v. Thompson*, 9 Q. B. 1037.

(h) *Alchorne v. Gomme*, 2 Bing. 54. See *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065.

(i) *Dyer v. Bowley*, 2 Bing. 94; 9 Moore, 196, *per PARKE, J.*

Paragraphs
900—903

in substance a plea of payment, and good, being a recognition of the mortgagor's right, and an admission that the rent alleged to have been satisfied was due to him (*k*). But a plea, that before the demise the owner mortgaged, and that the mortgagee gave notice, the tenant attorned, and the mortgagee distrained, amounts to a denial of the right to demise (*l*) ; and a plea of notice and claim by the mortgagee, without an averment of consequent payment of the rent to him, is insufficient (*m*).

Doctrine of
estoppel as
between
mortgagor
and tenant
inapplicable
to action for
breach of
covenant
after deter-
mination of
lease.

901. The doctrine of estoppel against the tenant, does not apply to such a case as an action by a mortgagor against a tenant for breach of agreement in not delivering up fixtures at the end of the term, when the mortgagee, after that time and before action by the mortgagor, has given notice and required payment of the rent ; and the mortgagor can only recover damages for the detention of the fixtures between the end of the term and the date of the mortgagee's notice (*n*).

Mortgagor
with power
to lease may
let to trustee
for himself.

902. A mortgagor to whom power is reserved to grant leases until entry by the mortgagee (including, it is submitted, every mortgagor to whom the statutory power in that behalf applies) may lease to a trustee for himself ; being within the exception as to dealings between persons filling fiduciary positions, which allows a tenant for life with power to sell or lease to execute the power to his own trustee (*o*).

Prior to 1881
mortgagee
could not
lease
property.

903. The mortgagee, before the Act of 1881, was equally unable to grant a valid lease for years of the mortgaged estate without the concurrence of the mortgagor (*p*). If he agreed to make a lease with the consent of the mortgagor, who afterwards refused to concur, the lessee was not allowed to insist upon a lease from the mortgagee alone ; because the lessee himself might be deprived of it on redemption by the mortgagor, to whom also the mortgagee might be made liable for wilful default if the lease be shown to have been improvident. And where the state of the title was known to the lessee, it seems he would have no right to damages (*q*). Whether he

(*k*) *Taylor v. Zamira*, 6 Taunt. 524 ; *Johnson v. Jones*, 9 Ad. & El. 809 ; foll. *Underhay v. Read*, 20 Q. B. D. 209. And see *Wilton v. Dunn*, 17 Q. B. 294.

(*l*) *Alchorne v. Gomme*, *supra*.

(*m*) *Wilton v. Dunn*, *supra*.

(*n*) *Watson v. Lane*, 11 Ex. 769, and *per* POLLOCK, C.B., the tenant was only estopped to the extent of the interest granted by the lease, and not after the termination of the lease ; and the doctrine of estoppel against a tenant is peculiar to the action of ejectment. But in *Delaney v. Fox*, 2 C. B. (N.S.) 768, the tenant was said to be estopped, whether the landlord was asserting his title by ejectment at the end of the term, or defending an action of trespass at a future period.

(*o*) *Bevan v. Habgood*, 1 Johns. & H. 222.

(*p*) *Hungerford v. Clay*, 9 Mod. 1. Unless, it was said, in case of necessity to avoid apparent loss.

(*q*) *Franklin v. Ball*, 33 Beav. 560.

could insist upon a lease from the mortgagee alone, when he was not privy to an intention that the mortgagor should concur, has been doubted; but it is submitted that in such a case there would be no specific performance of a contract which the mortgagor might render nugatory, and that the relief would be in damages only.

Paragraphs
903—906

904. Where a lease by the mortgagee is confirmed by the mortgagor, and a power of re-entry is reserved to them, or either of them, to re-possess as of his and their former estate, then as the mortgagor and mortgagee cannot have a joint interest, the right enures to the benefit of the person having the legal interest for the time; that is, to the mortgagee while his interest lasts, and to the mortgagor when his commences; but they cannot sue on a joint demise (*r*). So if rent be expressly made payable to the mortgagee during the continuance of the mortgage, and afterwards to the mortgagor, the covenant is several; and an action will be well brought by persons claiming under the mortgagee, without joining the mortgagor (*s*).

Where lease by mortgagee is confirmed landlord is owner of legal reversion.

905. A joint lease by mortgagee and mortgagor operates as a lease by the mortgagee, with an equitable confirmation by the mortgagor, who is in law a stranger to the estate, a covenant by him as incident to the demise cannot be implied, and he cannot be sued jointly with the mortgagee (*t*). If the covenants in the joint lease are only with the mortgagor and his assigns, an assignee of the mortgagee cannot sue for breach of the covenants, because they are collateral to, and do not run with, his interest in the land (*u*); but the mortgagor for the same reason, though the reversion be extinguished, may sue the lessee on the covenants (*x*).

Effect of a joint lease by both.

Where in the joint lease the covenants are with the mortgagee, who has the legal reversion, jointly with the mortgagor, who has none, the covenants run with the land, and may be sued upon by the joint covenantees (*y*).

SUB-SECTION (4).—*Of the effect of the Mortgagee's right in relation to Tenancies created after the security and since December 31st, 1881.*

906. The inconvenience arising from the fact that neither the mortgagor nor the mortgagee, by reason of their limited ownership, could alone make a lease which would be valid as against the other, has been remedied by the 18th section of the Conveyancing and Law of Property Act, 1881, which provides that if and as far as

Certain leases made by party in possession are now valid.

(*r*) *Doe d. Barney v. Adams*, 2 Cr. & J. 232.

(*s*) *Harrold v. Whitaker*, 11 Q. B. 147.

(*t*) *Smith v. Pocklington*, 1 Cr. & J. 445.

(*u*) *Webb v. Russell*, 3 T. R. 393.

(*x*) *Stokes v. Russell*, 3 T. R. 678. See *Thwaites v. M'Donough*, 2 Ir. Eq. R. 97.

(*y*) *Wakefield v. Brown*, 9 Q. B. 209; *Magnay v. Edwards*, 17 Jur. 839.

Paragraph 906 a contrary intention is not expressed in the mortgage deed, or otherwise in writing, and subject to the terms of the deed, or of any such writing—

- (1.) A mortgagor of land while in possession, as against every incumbrancer; and (2) a mortgagee of land while in possession as against all prior incumbrancers, and as against the mortgagor (which word by the interpretation clause will include subsequent incumbrancers), may make (3) an agricultural or occupation lease (z) for any term not exceeding 21 years, and a building lease for any term not exceeding 99 years; (4) with power to execute and do all assurances and things necessary and proper in that behalf;
- (5.) Every such lease shall take effect in possession not later than twelve months after its date: (6) shall reserve the best rent (a) that can reasonably be obtained, regard being had to the circumstances, but without any fine being taken; (7) shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time specified in the lease, not exceeding thirty days; (8) a counterpart shall be executed by the lessee, and delivered to the lessor; of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and of all persons deriving title under him, be sufficient evidence;
- (9.) Every such building lease shall be in consideration of the lessee or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings new or additional; or having improved or repaired, or agreeing to improve or repair buildings within that time; or having executed, or agreeing to execute within that time on the land leased, an improvement for or in connection with building purposes; (10) and a peppercorn or nominal or other rent, less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term;
- (11.) In case of a lease by a mortgagor, he shall, within one month after making it, deliver to the mortgagee, or the mortgagee first in priority, a counterpart duly executed by the lessee; but the lessee shall not be concerned to see that this is complied with;

(z) The inclusion in the lease of chattels and sporting rights over other land comprised in the mortgage but not in the lease, does not take a lease out of the description of "an occupation lease" (*Brown v. Peto*, [1900] 2 Q. B. 653).

(a) The rent must be paid annually or oftener. A lump sum for future years will not do: *Municipal, etc., Building Society v. Smith*, 22 Q. B. D. 70.

- (12.) A contract to make or accept a lease under s. 18 may be enforced by or against every person on whom the lease, if granted, would be binding; *Paragraphs*
906—908
- (13.) The mortgage deed may reserve to, or confer on the mortgagor or the mortgagee, or both, any further or other powers of leasing, or having reference to leasing; which powers shall be exercisable as far as may be, as if they were conferred by the Act, and with all the like incidents, effects and consequences, unless a contrary intention is expressed in the mortgage deed;
- (15.) The Act does not enable a mortgagor or mortgagee to make a lease for a longer term, or on any other conditions, than such as could have been granted or imposed by the mortgagor with the concurrence of all the incumbrancers, if the Act had not passed;
- (16.) The section applies only in case of a mortgage made after the commencement of the Act; but the provisions, or any of them, may by agreement in writing made after the commencement of the Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of the Act, so that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement;
- (17.) The provisions of the section referring to a lease, extend and apply, as far as circumstances admit, to any letting, and to any agreement, whether in writing or not, for leasing or letting.

907. A lease granted under these powers has the same effect as if both mortgagor and mortgagee were parties to it, so that if a mortgagor grants such a lease the assignees of the mortgagee cannot obstruct the lessee's lights (b). On the same ground the mortgagee (on default being made by the mortgagor) becomes lessor, and may enforce payment of the rent and performance and observance of the covenants (c). A surrender of such a lease cannot effectively be made to the mortgagor without the joinder of the mortgagee (d). A lease under the statutory power is not invalidated by reason of its containing an option for determination or renewal; but it is invalidated as against the mortgagee by the inclusion of other land not comprised in the mortgage at a single inclusive rent (e).

908. It certainly appears desirable that some check should be provided by a mortgage deed upon the powers given by this clause. A provision that notice should be given by the proposed lessor to the

Effect of leases granted under statutory power.

Suggested modifications of power, to be inserted in mortgages.

(b) *Wilson v. Queen's Club*, [1891] 3 Ch. 522.

(c) *Municipal, etc. Building Society v. Smith*, 22 Q. B. D. 70.

(d) *Robbins v. Whyte*, [1906] 1 K. B. 125.

(e) *King v. Bird*, [1909] 1 K. B. 837.

Paragraph
908

other party to the mortgage seems at least to be proper, especially where a building lease is intended to be made; for it is only reasonable that a mortgagor should have an opportunity of redeeming, or a mortgagee of foreclosing, before an arrangement is made, which may be designed solely for the benefit of other property of the lessor; or which, being of a speculative or capricious nature, may seriously injure the value of the mortgaged estate. There appears to be nothing to prevent a reckless mortgagor from making the security valueless by granting building leases to persons of insufficient means, and throwing the property upon the mortgagee's hands covered with half-finished buildings.

The provision at the end of the 11th sub-section is of little or no value to the mortgagee, for whose benefit it seems to have been intended. It may sometimes be difficult to determine which mortgagee is first in priority, and there is no way of compelling the mortgagor to perform the duty thrown upon him except by action. A case, in fact, came to the author's knowledge in which the mortgagor, instead of delivering the counterpart lease to the mortgagee, deposited it with another person as security for a loan.

SECTION II.

Of the Mortgagee's right to Possession of Movable Property.

SUB-SECTION (1).—*Of the effect of the Mortgagee's right on the Mortgagee and persons claiming through him.*

	PARAGRAPH
<i>Bills of Sale Act, 1882</i>	909
<i>Rights as against third parties</i>	910
<i>Creditor's right prevails against purchaser</i>	911
<i>Mortgagor's bailee may deliver to mortgagee</i>	912
<i>Where goods seizable on demand for non-payment of debt reasonable time must be given</i>	913
<i>Pledge of choses in action</i>	914

SUB-SECTION (2).—*Of the Preservation and User of Pledged and Mortgaged Chattels.*

<i>Where several chattels pledged for one debt no one can be redeemed without payment of entire debt</i>	915
<i>Law of pledged goods</i>	916
<i>Destruction of pledged goods by fire</i>	917
<i>Deterioration of goods pledged with pawnbrokers</i>	918
<i>Refusal or neglect by pawnbroker to re-deliver pledged goods</i>	919
<i>Liability of person who has a lien on pledged goods</i>	920
<i>Pledgee or party having lien cannot charge for warehouse room</i>	921
<i>How far pledgee can use pledged chattels</i>	922
<i>Rights of mortgagee of a ship as to use of it</i>	923
<i>Rights of mortgagor of a ship as to use of it</i>	924

SUB-SECTION (1).—*Of the effect of the Mortgagee's right on the Mortgagor or persons claiming through him.* Paragraph 909

909. By s. 7 of the Bills of Sale Act, 1882, it is enacted that personal chattels (within the meaning of the Act) assigned by a bill of sale (falling under the Act) shall not be liable to be seized or taken possession of by the grantee for any other than the following causes **(91, 95)** :—

- (1.) If the grantor shall make default in payment of the sum or sums of money thereby secured, at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security **(96, 97)**.
- (2.) If the grantor shall become *bankrupt* **(95)**, or suffer the said goods, or any of them, to be distrained for rent, rates or taxes.
- (3.) If the grantor shall fraudulently either remove, or suffer the said goods or any of them to be removed from the premises.
- (4.) If the grantor shall not (without reasonable excuse) upon demand in writing by the grantee, produce to him his last receipts for rent, rates and taxes.
- (5.) If execution shall have been levied against the goods of the grantor under any judgment at law.

Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise, the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

As to the effect of provisions in the bill which conflict with the above restrictions on seizure, see **(95, 97)**.

The five excepted cases to the prohibition against seizure by the mortgagee are strictly construed. Thus, where the mortgagor has not in fact paid his rent which, although a few days overdue, had not been demanded, he does not fall within (4) by omitting to produce the receipts (*f*). Nor is the mortgagee entitled to require the receipt to be sent to him by post (*g*). With regard to the power of the court, on seizure, to order delivery up of possession on payment of principal, interest, and costs, that depends on whether the seizure has been made for the purpose of realizing or only for the purpose of protecting the security. In the former case delivery up will be ordered under the general rule that a mortgagee who takes steps

(*f*) *Exp. Cotton*, 11 Q. B. D. 301; *Exp. Wickens*, [1898] 1 Q. B. 543.

(*g*) *Exp. Wickens*, *supra*.

Paragraphs 909—912 to realize is estopped from declining to receive payment (*h*) (1499). In the latter, if the date of payment has not arrived, redemption will not be forced on the mortgagee (*i*).

Rights as
against
third
parties.

910. The mortgagee of personal chattels may sue third parties in respect of them, if, when the cause of action accrued, he had a right to immediate possession. Apart from the above Act this right was complete, if there were an assignment to the mortgagee not qualified by any clause which gave the mortgagor a right to continue in possession until default in payment on demand, nor limited as to the right of possession till some other future time which had not arrived when the goods were taken by a third person (*k*). If he had that legal right, though it were coupled with a trust to permit the mortgagor to hold till demand of the debt, it was sufficient to support the action; the trust being consistent with a right of possession in the mortgagee (*l*). And the right was not affected by the giving a bill of exchange on account of the debt, although the bill had been indorsed over for value (*m*). What the effect of the Bills of Sale Act, 1882, is in this respect seems never to have been decided. But it is apprehended that as it takes away (without any qualification) the right of possession of the mortgagee except in the five specified cases, the rights of the mortgagee against third parties must be affected in precisely the same way as if s. 7 were set out in the mortgage. Where the Sheriff has taken possession of the goods and interpleads he will as a rule be ordered to withdraw unless the judgment creditor is willing to redeem (*n*).

Creditor's
right prevails
against
purchaser.

911. And if the mortgagor, being in possession after the mortgage, disable himself by a voluntary and wrongful act from delivering the chattel to the mortgagee, the latter may bring his action against the purchaser, who, except he bought in market overt, or under the provisions of the Factors Act or the Sale of the Goods Act (384, 405), can acquire no title by the wrongful act of the mortgagor (*o*).

Mortgagor's
bailee may
deliver to
mortgagee.

912. The mortgagee may also recover against a bailee, to whom the chattel was delivered by the mortgagor, before the mortgage; and therefore (*p*), after demand by the mortgagee, the bailee is justified in refusing to re-deliver the chattel to the mortgagor,

(*h*) See *Exp. Cotton*, *supra*; *Exp. Wickens*, *supra*.

(*i*) *Exp. Ellis*, [1898] 2 Q. B. 79.

(*k*) 2 Roll. Abr. 21, 22; *Bradley v. Copley*, 1 C. B. 685; *Wheeler v. Montefiore*, 2 Q. B. 133. The purchaser of chattels cannot sue for them in trover while the vendor's lien for the purchase money remains unsatisfied. *Lord v. Price*, L. R. 9 Ex. 54.

(*l*) *White v. Morris*, 16 Jur. 500.

(*m*) *Bramwell v. Eglington*, 5 B. & S. 39.

(*n*) *Stern v. Tegner*, [1898] 1 Q. B. 37.

(*o*) *Cooper v. Willomatt*, 1 C. B. 672.

(*p*) *European, etc., Co. v. Royal Mail, etc., Co.*, 8 Jur. (N.S.) 136.

notwithstanding his contract to do so made before his situation was changed by the mortgage. Paragraphs
912—915

913. If a mortgage of chattels be subject to a proviso for redemption on payment at a certain day, or at such earlier day as the mortgagee shall appoint by notice, the notice given must be sufficient to allow the mortgagor a reasonable time to obtain the money, and not illusory, as a half-hour's notice (*q*); that being only equivalent to payment on demand, for which the parties, if they desired to do so, might have expressly provided. Where the covenant is to pay immediately on demand, the demand must be made upon the debtor himself, and he must have a reasonable opportunity to comply with the demand, and, if the demand be made by an agent, to ascertain if he be duly authorized to receive the money (*r*). If, however, he bring his action for a wrongful taking of goods, for want of reasonable opportunity allowed for payment on demand, the damage will only be for the value of his interest in the goods at the time of seizure, and not for their actual value; for the creditor would otherwise be deprived of the benefit of the security.

914. The pledgee of a negotiable security may recover and receive the money due thereon, suing for it in his own name; but generally he has no right to compromise the claim for less than is due upon the security; and if he do so, he will be bound to account to the pledgor, for the full value (*s*). On the other hand, the mortgagee of an interest in a trust fund or other chose in action is not entitled to receive the whole of the mortgagor's interest, but only so much as suffices to discharge the principal, interest, and costs due on the mortgage (*t*). Apparently the mortgagor of a patent can sue for infringement without joining the mortgagee even where the latter is registered "as assignee." (*u*). Pledgee of
chose in
action, and
mortgagee
of patent.

SUB-SECTION (2).—Of the Preservation and User of Pledged and Mortgaged Chattels.

915. The general rights and liabilities which are incidental to the mortgagee's possession of the mortgaged estates, are for the most part brought in question in taking the accounts between the parties, and will therefore be fully explained in the chapter relating to that subject (**1742**). But the possession of chattels, whether by way of mortgage, pledge, or lien, involves considerations peculiar Where
several
chattels
pledged for
one debt no
one can be
redeemed
without
payment of
entire debt.

(*q*) *Brightly v. Norton*, 3 B. & S. 305; 32 L. J. Q. B. 38. See *Exp. Trevor, Re Burghardt*, 1 Ch. D. 297; *Exp. Lamb, Re Southam*, 19 Ch. D. 169.

(*r*) *Belding v. Read*, 3 H. & C. 955; *Toms v. Wilson*, 32 L. J. Q. B. 382; *Moore v. Shelley*, 8 App. Cas. 285.

(*s*) Story, *Bailments*, § 321.

(*t*) *Re Bell, Jeffery v. Sayles*, [1896] 1 Ch. 1; approved and applied in *Hockey v. Western*, [1898] 1 Ch. 350.

(*u*) *Van Gelder Apsimon & Co. v. Sowerby Bridge United District Flour Society*, 44 Ch. D. 374.

Paragraphs
915—917

to the nature of those forms of security, and which may be conveniently referred to in this place.

The pawnee of chattels is bound to restore the pledge upon payment of the debt (*w*), but if the general property in several chattels pledged for a single debt, become vested in different persons, the pledgee is not bound to give up any one of them to its owner until the whole debt is paid; nor is he (*x*) liable in trover if he refuse to deliver the pledge upon tender by some only of several tenants in common or joint tenants (*y*).

Loss of
pledged
goods.

916. A pledgee must use ordinary diligence, and is liable to the pawnor or his assignee for ordinary neglect in the care of it; and the default for which he is responsible extends as well to acts of omission as of commission (*z*). If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because by detaining them after the tender of the money he is a wrong-doer and a wrongful detainer of the goods, and the special property of the pawnee is determined (**192**); and a man who keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss (*a*). Hence Story confines the liability to cases in which the same loss or accident would not otherwise inevitably have happened (*b*). As to the pawnee's liability in cases of theft, it is laid down that theft *per se* establishes neither responsibility nor irresponsibility in the bailee (*c*); if the theft be occasioned by negligence, the bailee is responsible; if without negligence, he is discharged. Ordinary diligence is not disproved even presumptively by mere theft, but the proper conclusion must be drawn from weighing all the circumstances of the particular case.

Destruction
of pledged
goods by fire.

917. Under the Pawnbrokers Act, 1872, where a pledge is destroyed or damaged by or in consequence of fire, the pawnbroker shall nevertheless be liable, on application within the period during which the pledge would have been redeemable, to pay the value of the pledge, after deducting the amount of the loan and profit, such

(*w*) Story, Bailments, § 332; Jones, Bailments, 75; Glanville, bk. 10, c. 8.

(*x*) *Franklin v. Neate*, 13 Mee. & W. 481. *Per* ROLFE, B.

(*y*) *Harper v. Godsell*, L. R. 5 Q. B. 422.

(*z*) Story, Bailments, § 342; *Franklin v. Neate*, 13 Mee. & W. 481. *Per* ROLFE, B.

(*a*) *Per* HOLT, C.J., in *Coggs v. Bernard*, 2 Lord Raym. 909; *Southcote's Case*, 4 Rep. 83 b.

(*b*) Bailments, § 341.

(*c*) Story, Bailments, § 338; Kent, 2 Comm. pp. 580, 581. And he adds: "I think it would be going quite far enough to hold, that such a loss is *prima facie* evidence of neglect, and that it lies with the pawnee to destroy the presumption."

value to be the amount of the loan, and profit at twenty-five per cent. on the amount of the loan.

Paragraphs
917—920

A pawnbroker is entitled to insure to the extent of the value so estimated (*d*).

918. If a person entitled and offering to redeem a pledge, shows to the satisfaction of a court of summary jurisdiction that the pledge has become or has been rendered of less value than it was at the time of pawning thereof, by or through the default, neglect or wilful misbehaviour of the pawnbroker, the court may, if it thinks fit, award a reasonable satisfaction to the owner of the pledge in respect of the damage, and the amount awarded shall be deducted from the amount payable to the pawnbroker, or shall be paid by the pawnbroker (as the case requires) in such manner as the court directs (*e*).

Deterioration of goods pledged with pawnbrokers.

919. If a pawnbroker, without reasonable excuse (proof whereof shall lie on him), neglects or refuses to deliver a pledge to the person entitled to have delivery thereof under the Act, he shall be guilty of an offence against the Act, and a court of summary jurisdiction may, if the court thinks fit, with or without imposing a penalty, order the delivery of the pledge on payment of the amount of the loan and profit (*f*). Honest loss of the thing pledged has, however, been held to constitute "reasonable excuse" within this section (*g*).

Refusal or neglect by pawnbroker to re-deliver pledged goods.

920. The liability of the holder of a chattel by way of lien, is the same as that of a pawnee—that is, he must use ordinary diligence (*h*). Some difficulty was felt in the allowance of a lien where the detention of it would cause expense to the claimant—the chattel being a mare, detained to answer the charge for covering—because of the question who should be liable for the feeding; but the difficulty was solved by reference to the analogous case of a distress, where he who distrains is compellable to take reasonable care of the chattel distrained, and if he put beasts in a pound covert must feed them; and to the case of a lien on corn, which requires labour and expense in the proper custody of it (*i*).

Liability of person who has a lien on goods.

(*d*) 35 & 36 Vict. c. 93, s. 27.

(*e*) *Id.* s. 28.

(*f*) *Id.* s. 31.

(*g*) *Allworthy and Walker v. Clayton*, [1907] 2 K. B. 685.

(*h*) *Angus v. McLachlan*, 23 Ch. D. 330.

(*i*) *Scarfe v. Morgan*, 4 Mee. & W. 270; Co. Litt. 47 b. In *Mulliner v. Florence*, 3 Q. B. D. at p. 491, Lord BRAMWELL seemed to have thought that a person who holds a live animal for a lien is not bound to feed it; and said that before 12 & 13 Vict. c. 92, the distrainer was not bound to feed beasts distrained damage feasant. He was, however, so bound by 5 & 6 Will. 4, c. 59, s. 4; and there is a close analogy between lien and pound covert, as to which he was always bound by law.

Paragraphs
920—922

The holder under a lien may, however, deal with the goods in a reasonable way to maintain his right ; and a shipping agent, claiming a lien on goods for the cost of transport, has therefore been held to be justified in bringing them back from the foreign port to which they have been sent, on non-payment of the charges (*k*).

Pledgee or
party having
lien cannot
charge for
warehouse
room.

921. The holder of a chattel under a lien, or, it is conceived, by way of pledge, cannot require payment for the use of the place in which the chattel is detained, or otherwise for keeping it. A right to such a payment cannot be acquired under a lien, by a notice that it will be demanded ; and if the payment be made under protest to regain possession of the chattel, the money may be recovered by action (*l*), as may also a sum paid in excess of what is justly due in respect of the debt for which the chattel is detained (*m*).

How far
pledgee can
use pledged
chattels.

922. Although the pawnee of a chattel cannot generally make a profit by it (*n*), yet, taking a special property in it by the act of the pledgor, he acquires with the possession a certain right of user, which does not belong to one whose possession (as in the case of a distress) arises by act in law (*o*). The pawnee's right of user depends upon the nature of the chattel, and the extent to which the use of it may be beneficial, injurious, or indifferent to its due preservation (1744). The result of the authorities upon this subject is thus stated by Mr. Justice *Story* (*p*) :—

1. If the pawn be of such nature that the due preservation of it requires some use, the use is not only justifiable but is indispensable to the faithful discharge of the duty of the pawnee.
2. If the pawn will be the worse for the use, as in the case of the wearing of clothes, the use will be prohibited (*q*).
3. If the keeping of it be a charge to the pawnee, as in the case of a cow or horse, it may be used by way of recompense : the cow may be milked, and the horse ridden (*r*).

(*k*) *Edwards v. Southgate*, 10 W. R. 528.

(*l*) *Somes v. British Empire Shipping Co.*, 8 H. L. C. 338 ; 1 EL., BL. & EL. 353 ; *Dimsdale v. London and Brighton Rail. Co.*, 3 Fost. & F. 169, n. See *Thames Ironwork Co. v. Patent Derrick Co.*, 1 Johns. & H. 93. But Lord ELLENBOROUGH seems to have thought that an analogous right could be maintained after a reasonable time and notice to remove the chattel. (*Hartley v. Hitchcock*, 1 Stark. 408.)

(*m*) *Ashmole v. Wainwright*, 2 Q. B. 837.

(*n*) *Langton v. Waite*, L. R. 6 Eq. 165.

(*o*) *Mores v. Conham*, Owen, 123.

(*p*) *Story*, Bailments, §§ 329, 330.

(*q*) See also *Mores v. Conham*, *supra*, per DANIEL, J.

(*r*) *Id.* ; per COOK, WARBURTON, and DANIEL, JJ.

4. If the use will be beneficial to the pawn, or indifferent, it may also be used. The instances of this suggested by Sir W. Jones are in the one case, a setter dog, and in the other, books (s).

5. If the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, the use of it is impliedly interdicted.

Upon this latter point the law was somewhat differently stated by *Holt*, C.J. (t), who is followed by Sir W. Jones. Using as an illustration the pawn of jewels to a lady, he says that *she might use them*; but then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is because the pawn is in the nature of a deposit, *and as such is not liable to be used*. The passage seems to be contradictory, and is too doubtful an authority for the conclusion that goods not liable to injury by mere use may be used by the pledgee at his peril. The distinction, however, between a liability arising from the use of a pledge which ought not to be used, and from its use where it can be lawfully used only at the peril of the pledgee, is probably of little practical importance.

923. The right of the mortgagee to make use of a ship is not precisely like that of the pawnee of an ordinary chattel, who, under the second of the above-mentioned rules, would evidently be prevented from using it; though the keeping it unused for any length of time would hardly be less injurious than its employment.

Rights of
mortgagee of
a ship as to
use of it.

The question is affected both by the higher nature of the interest of a mortgagee, and by the provision of the Merchant Shipping Act, 1894 (u), that the mortgagee shall not by reason of his mortgage acquire, nor the mortgagor lose, the character of owner, except so far as may be necessary for making the ship or share available for payment of the mortgage debt. A right of user may of course be created by express agreement, or may be inferred from the terms of the security; and where according to this the ship, though in the

(s) Jones, Bailments, §1.

(t) *Coggs v. Bernard*, 2. Lord Raymond, 909; Under the Mohammedan law, there is, according to the *Hedāya*, a right to the possession only, and not to the usufruct of the pawn; and if the pawnee sell, let out, or pledge the pawn, he commits a transgression for which he must make reparation (the pledge beyond the amount of the debt being a trust), but no dissolution of the contract takes place. The distinction between the use and preservation of the pawn is curiously illustrated by the example of a ring, for the loss of which the pawnee is responsible if he wear it on his little finger, which is a use; but not if he wear it on any other finger, which is considered to be a means of preservation, because it is contrary to the customary mode of wearing a ring. So of a sheet, which he may spread over his shoulders, but may not wear in the usual manner. (Pawns, Ch. 1.)

(u) 57 & 58 Vict. c. 60, s. 34.

Paragraphs
923—924

possession of the mortgagees, was not to be sold till two months after demand in writing of the debt, it was considered (*x*) that a right to use the ship during that interval was implied, and not an intention that she should remain useless; and that such a right was contemplated by the provision of the Shipping Act then in force, as a means by which the ship might be made available for the payment of the mortgage debt; and was also incident to the character of a mortgagee as distinguished from that of a mere bailee. The judges of the Court of Appeal, however, taking a lower view of the mortgagee's rights, appear in effect to have agreed, that, though the first duty of the mortgagee of a ship who takes possession is to sell, he is not bound to do so at every sacrifice; and if he cannot reasonably or prudently do so, he will be justified, in the exercise of the sound discretion of a prudent owner, in employing the ship (*y*). But the unlimited right to send her to any distance, and to employ her for any indefinite time at the mortgagor's costs for repairs, wages, insurance, and other disbursements and risks, and at the risk of involving him in speculative adventures, was strongly denied (*z*).

Where mortgagees in possession employed the ship in a trade which they had notice was unremunerative, and in so doing injured her, and afterwards made an improvident sale, they were charged with her value at the time of taking possession; although in the opinion of *Turner, L.J.*, they should properly have been charged with what she might have earned if chartered in the ordinary course, according to the usual mode of charging mortgagees in possession, and with all damages beyond ordinary wear and tear occasioned by the use made of her (*a*).

A mortgagee may properly refuse to enter into a charter-party for the employment of the ship in a voyage of a speculative character (*b*).

Rights of
mortgagee of
a ship as to
use of it.

924. The mortgagor, on the other hand, while the mortgagee allows him to retain possession (and in the absence of express contract the mortgagor is entitled to possession until the debt is payable, unless the ship is being so dealt with as to impair the security (*c*)), has full liberty to deal with the ship, so far as he can do so consistently with the sufficiency of the security. And the mortgagee, so long as he does not interfere, will be held to have acquiesced in all proper engagements for her use which have been

(*z*) *European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 4 K. & J. 676.

(*y*) *Marriott v. Anchor Reversionary Co.*, 3 De G., F. & J. 177; *De Mattos v. Gibson*, 1 Johns. & H. at p. 85, per WOOD, V.-C.

(*z*) *Id.*

(*a*) *Id.* As to damages for loss of profit where a mortgagee is restrained from using the ship, see *De Mattos v. Gibson*, 1 Johns. & H. 79.

(*b*) *Samuel v. Jones*, 7 L. T. (N.S.) 760.

(*c*) *The Blanche*, 58 L. T. 592; *The Heather Bell*, [1901] P. 272.

made by the mortgagor ; who may enter into such contracts for her use as are proper to give the mortgagor the full benefit of the ownership, and by means of which he may earn the means of discharging the mortgage debt (*d*) : and the mortgagee cannot interfere with such a contract, without showing that it will materially prejudice his security (*e*). And as well for the above-mentioned purpose, as that she may be a source of profit to the mortgagee himself when he takes possession, the mortgagor may do all that is proper to keep the ship in an effective condition ; and for such repairs as are made by his direction when in possession, the shipwright may enforce his possessory lien against the mortgagee (*f*) (627).

If, however, the mortgagee can show that the acts of the mortgagor will injure his security, the statutory provision that the mortgagor shall retain the character of owner (which in fact is said to have been for the benefit of the mortgagee) will cease to operate (*g*). And the mortgagee, upon taking possession, may require payment to himself, of the fruit of any contract for the use of the ship which has been made by the mortgagor. But as the right to receive the earnings of the ship, whether freight or passage money, does not pass to him by way of assignment of the freight (unless it be specially assigned as incident to the ownership of the vessel) he must take possession, or assert his right by some other tantamount act ; as by requiring payment from the charterer before the mortgagor has received the produce (*h*) ; or where the mortgage is only upon shares of the ship belonging to the ship's husband, by joining with the other co-owners in appointing another ship's husband (*i*) ; otherwise, like the produce of a mortgaged estate, the freight cannot be recovered from the mortgagor who has received it (1721) (*k*). And, even in the hands of the mortgagee, the produce is liable for the expenses of the voyage in which it was

(*d*) *Collins v. Lamport*, 11 Jur. (N.S.) 1 ; *The Innisfallen*, L. R. 1 Ad. & E. 72 ; *Johnson v. Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38 ; *Keith v. Burrows*, 2 App. Cas. 636.

(*e*) *The Fanchon*, 5 P. D. 173 ; and *The Blanche*, *supra*.

(*f*) *Williams v. Allsup*, 10 C. B. (N.S.) 417. See *The Skipwith*, 10 Jur. (N.S.) 445. *Per* BEST, C.J., *Dean v. M'Ghie*, 4 Bing. 49.

(*g*) *Collins v. Lamport*, *supra* ; *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade*, [1905] 1 K. B. 815 ; and see *Laming & Co. v. Seator*, 16 Ct. of Sess. Cas. 828.

(*h*) *Morrison v. Parsons*, 2 Taunt. 407 ; *Dean v. M'Ghie*, 4 Bing. 49 ; *Gardner v. Cazenove*, 1 H. & N. 423 ; *Willis v. Palmer*, 7 C. B. (N.S.) 340 ; *Wilson v. Wilson*, L. R. 14 Eq. 32 ; *Keith v. Burrows*, 2 App. Cas. 636. But there can be no claim for freight where the goods are shipped on account of the owners. *Gumm v. Tyrie*, 4 B. & S. 680, *per* COCKBURN, C.J. And see *Keith v. Burrows*, *supra*.

(*i*) *Beynon v. Godden*, 3 Ex. D. 263.

(*k*) *Rusden v. Pope*, L. R. 3 Ex. 269 ; *Wilson v. Wilson*, *supra*.

Paragraph
924

earned (*l*). The mortgagee, whether in possession or not, is not liable for necessities supplied to the ship, unless they were ordered by his agent or upon his credit (*m*). Nor does the lien created by ss. 4 and 5 of the Admiralty Court Act, 1861, take priority of his claims, unless (*semble*) he has expended money by leave of the court (*n*). And if he have paid expenses for which the ship was liable in order to obtain possession of her, he may recover them from the person by whose neglect to pay them the ship became liable (*o*).

(*l*) *Green v. Briggs*, 6 Hare, 395; *Cato v. Irving*, 5 De G. & Sm. 210; *Alexander v. Simms*, 18 Beav. 80; affirmed, 5 De G. M. & G. 57.

(*m*) *The Troubadour*, L. R. 1 Ad. & E. 302; *Twentyman v. Hart*, 1 Stark. 366; *Briggs v. Wilkinson*, 7 B. & C. 30; *Myers v. Willis*, 17 C. B. 77; 18 C. B. 886; and see *The Argentino*, [1909] P. 236. If the mortgagee, also filling another character with reference to the ship, gives directions for repairs, the question in what character he acted is for the jury. (*Castle v. Duke*, 5 Car. & P. 359.)

(*n*) *The Lyons*, 57 L. T. 818.

(*o*) *Johnson v. Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38.

CANADIAN NOTES

RIGHTS OF MORTGAGOR GENERALLY

WHERE notwithstanding the omission of the redemise clause it sufficiently appeared from the provisions of the mortgage itself and the course of dealing, that it was the intention of the parties that the mortgagor should retain possession until default, the mortgagees were enjoined from disturbing the mortgagor's possession until such default (*a*). A mortgagor is not accountable to the mortgagee for rents and profits received while in possession, though the security proves deficient (*b*), nor is he in general liable for waste (*c*). By sub-s. 4 of s. 58 of the Ontario Judicature Act (*d*) a mortgagor may now sue in his own name. Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold, even although after the trespass and before action brought he has parted with his equity (*e*). A mortgagor of a term may restrain a mortgagee in possession from committing waste even although the mortgagee has obtained the consent of the reversioner (*f*). The mortgagee is entitled to the possession of all title deeds of the mortgaged lands, and formerly the mortgagor was not entitled even to inspect them. But now under the Act respecting Mortgages of Real Estate (*g*) the mortgagor, so long as his

(*a*) *Superior Savings and Loan Society v. Lucas* (1879), 44 U. C. R. 106.

(*b*) *Wafer v. Taylor* (1852), 9 U. C. R. 609.

(*c*) *Wafer v. Taylor* (1852), 9 U. C. R. 609.

(*d*) R. S. O. (1897), c. 15.

(*e*) *Brookfield v. Brown* (1893), 22 S. C. R. 398; see also *M^cMullen v. Free* (1887), 13 Ont. 57.

(*f*) *Chisholm v. Sheldon* (1850), 1 Gr. 318.

(*g*) R. S. O. (1897), c. 121, s. 3, sub-s. 1.

right to redeem subsists, may inspect the title deeds. Where the mortgagor has conveyed away his equity of redemption he may be discharged from liability under his covenant for payment if the mortgagee deals with the purchaser of the equity of redemption to the prejudice of the mortgagor, as, for example, if the mortgagee extends the time for payment (*h*). But if in such an agreement to extend the time for payment the rights of the mortgagee are expressly reserved he will not be discharged (*i*). Where the dealings do not amount to a new contract and there is no binding agreement to extend the time for payment, the right of action will be impaired (*k*).

In *M'Craig v. Barber* (*l*), an action on the covenant for payment, the defendant, a mortgagor of land, sold the equity and took from the purchaser a covenant to pay off the mortgage, which he assigned to the plaintiff, the mortgagee, who afterwards, without his knowledge, took by assignment from the purchaser of the equity the benefit of similar covenants from sub-purchasers and agreed to exhaust her remains against the latter before suing the purchaser. It was held that the mortgagee being the sole owner of the covenant of the purchaser of the equity with the mortgagor, assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and the purchaser. The mortgagee, therefore, had no present right of action on the covenant in the mortgage. A mortgagor is entitled to a release of the mortgage debt if the mortgagee purchases the equity of redemption under a writ of execution against the lands (*m*).

Surplus proceeds arising under the foreclosure of a mortgage made by S. B. to plaintiff were directed to be paid to M.,

(*h*) *Mathers v. Helliwell* (1863), 10 Gr. 172; *Aldous v. Hicks* (1891), 21 Ont. 95; *Trust and Loan Co. v. M'Kenzie* (1896), 23 Ont. App. 167; *M'Craig v. Barber* (1898), 29 S. C. R. 126.

(*i*) *Trust and Loan Co. v. M'Kenzie* (1896), 23 Ont. App. 167.

(*k*) *Aldous v. Hicks* (1891), 21 Ont. 95.

(*l*) (1898), 29 S. C. R. 126.

(*m*) R. S. O. (1897), c. 77, s. 32.

who claimed under a mortgage made to him by A. B., who was residuary legatee, subject to certain charges under the will of S. B. Held, that the mortgage made to M. by A. B. covered only the individual interest of the mortgagor in the property, subject to the charges imposed upon the property under the terms of the will, and that the surplus proceeds should remain in Court pending an inquiry as to the extent of the liability under such charges, which were entitled to priority over the mortgage made by the residuary legatee (*n*).

See also Chapter on the Covenant for Payment *ante* 416*a*, and see *Gilroy v. Proe*, post, p. 932*m*, as to agreement to extend time for repayment.

RECEIVER

UNDER sub-s. 9 of s. 58 of the Ontario Judicature Act (*a*) a receiver may be appointed in all cases in which it shall appear to the Court to be just or convenient that such order should be made.

An equitable mortgagee is after default entitled to a receiver where the mortgagor is in possession whether the security is scanty or not, and he need not make a prior mortgagee who has the legal estate a party to the action (*b*). Where a prior mortgagee in possession has acquired the equity of redemption and it is shown that he has received more than sufficient to pay off his mortgage a receiver may be appointed (*c*). As to mortgagee taking proceedings to realize on property in possession of a receiver, see *Allan v. Manitoba and North-Western Railway Co., Re Gray et al* (1894), 10 Man. L. R. 106.

(*n*) *Hutchinson v. Bent* (1908), 42 N. S. R. 417.

(*a*) R. S. O. (1897), c. 51.

(*b*) *Atkins v. Blain* (1867), 13 Gr. 646.

(*c*) *Steinhoff v. Brown* (1865), 11 Gr. 114.

ATTORNMENT CLAUSE

It has been held that a stipulation in the form of a statutory distress clause(*a*), coupled with the provision that the mortgagor should continue in possession until default, but without any express attornment clause created the relation of landlord and tenant at a fixed rent(*b*). That decision was reversed by the Ontario Court of Appeal(*c*). It has since been held by the Supreme Court of Canada that such a distress clause does not create the relation of landlord and tenant(*d*). In the case just cited the mortgage in question contained in addition to the statutory distress clause the following provision: "And the mortgagor doth release to the company all his claims upon the said lands and doth attorn to and become a tenant at will to the company subject to the said proviso. No fixed rent was stated, and the mortgage did not in terms refer to the interest as rent." And it was held, affirming the judgment of the Court of Appeal(*e*), the Supreme Court being equally divided, that the relation of landlord and tenant was not created by the statutory distress clause. And it was further held that the attornment clause in the mortgage in question failed to create a tenancy on the ground that there was no reservation of rent sufficient to entitle the mortgagees to claim the landlord's right as against an execution creditor.

The purchaser of mortgaged premises is not a tenant of the mortgagee or his assignee, and cannot be dispossessed by the

(*a*) R. S. O. (1897), c. 126, Schedule B, clause 15.

(*b*) *Royal Canadian Bank v. Kelley* (1869), 19 U. C. C. P. 196.

(*c*) 19 U. C. C. P. 430; 14 L. C. J. 8.

(*d*) *Trust and Loan Co. v. Lawrason* (1882), 10 S. C. R. 679.

(*e*) 6 Ont. App. 286.

summary procedure provided for by the Landlords and Tenants Act, R. S. M. (1902), c. 93, although the mortgage contains clauses creating the relation of landlord and tenant between the parties, and giving the mortgagee the right to distrain for arrears of interest as rent. Neither can the mortgagee or his assignee, in such a case, distrain upon goods other than those of the mortgagor for such arrears of interest (*f*).

A mortgage made by the plaintiff to the defendants secured \$36,000, and interest at 5 per cent. payable by instalments, this rate of interest to be paid both before and after maturity. It had the usual statutory covenants and the following: "Provided that in default of the payment of interest hereby secured the principal shall become payable. Provided that until default of payment the mortgagor shall have quiet possession of the said lands. Provided that so long as the mortgagor his heirs executors administrators or assigns shall remain in possession of the said land then he or they shall hold the same by tenancy at will under the said mortgagees their successors or assigns at an annual rent equal to the said yearly interest and payable at the times set forth for the payment of the said interest any such rent collected to be applied towards satisfaction of such interest and that if the tenancy be determined at any time the rent accrued up to that period shall be payable forthwith for the purpose of enforcing remedies for the collection thereof." This formed one sentence in the mortgage and had no stops throughout. Held, that it contained no repugnancy or inconsistency (*g*). The mortgagor remaining in possession before the execution of mortgage had the right, under the provision for quiet possession until default, to enjoy the premises, but for no determinate period, and his tenancy thereunder was a tenancy at will and such provision was therefore not inconsistent with an express tenancy at will at a half yearly rent. There being a tenancy at will at a fixed rent, there was, as incident to it, the right to distrain, and the covenant for quiet enjoyment must be read as subject to such right. After the mortgagor had made default his continuance in possession was still as tenant

(*f*) *Chalmers v. Freedman*, 18 Man. L. R. 623; 10 W. L. R. 434, and see Man. Distress Act, R. S. M. (1902), ch. 49.

(*g*) *Trust and Loan Co. v. Lawrason* (1882), 10 S. C. R. 679, distinguished.

at will. After default the mortgagor, at the instance of the mortgagees, assigned his equity of redemption to his wife and she took possession and agreed to apply the proceeds of the land to the payment of the mortgage: Held that this operated as a new tenancy at will with the wife who became liable for the payment of the rent as the assign of her husband with the assent of the mortgagees and her goods were therefore distrainable for rent, and the goods of her husband might also be distrained as it was a case of real tenancy. Held, however, that the defendants were liable for selling the distress without appraisal or valuation, and the measure of damages was the real value of what was sold minus the rent due (*h*).

The attornment clause is generally in the following form: The mortgagor hereby attorns to the mortgagee and becomes a tenant of the said lands during the term of this mortgage at a rent equivalent to and payable at the same days and times as the payments of interest are hereinbefore agreed to be paid, such rent when so paid to be in satisfaction of such payments of interest, provided that the mortgagee may in default of payment or on breach of any of the covenants hereintofore contained enter on the said lands and determine the tenancy hereby created without notice. Provided that neither the existence of this clause nor anything done by virtue thereof shall render the mortgagee liable as mortgagee in possession so as to be accountable for moneys except those actually received.

A mortgage contained the following attornment clause:—"Whereby the mortgagor became tenant of the lands to the mortgagees at a yearly rental equal to the interest to be paid in the manner and upon the terms hereinbefore appointed for the payment of interest," it was held that a valid relationship of landlord and tenant was created (*i*).

A mortgage of real estate provided that the money secured thereby, amounting to \$20,000, should be payable with interest at 7 per cent. per annum as follows:—\$500 on December 1st,

(*h*) *Pegg et rez v. Supreme Court of the Independent Order of Foresters* (1901), 1 O. L. R. 97.

(*i*) *Linstead v. The Hamilton Provident and Loan Society* (1896), 11 Man. R. 199.

1883; \$500 on the first days of June and December in each of the four following years; and \$15,500 on June the 1st, 1888, and contained an attornment clause reserving rent equal in amount to the amount payable as interest; it was held that the rent reserved was so unreal and excessive as to show conclusively that the parties could not have intended to create a tenancy and that the arrangement was unreal and fictitious (*k*).

There was no statutory distress clause and the mortgagees did not execute the mortgage, and it was also held that the mortgage deed failed to create between the mortgagor and mortgagee the relation of landlord and tenant so as to give the mortgagees the right to distrain the terms of the demise amounts to an estoppel binding on him.

A rent that is certain is essential to the creation of a valid tenancy. The rent must be fixed and certain. Where a mortgage contained a special provision by which the mortgagors became lessees of the mortgaged lands until the maturity of the mortgage at a rental of the same amount as the interest, and the mortgagee distrained for arrears of interest which accrued after the maturity of the mortgage, it was held that there was no definite tenancy after the maturity of the mortgage, and that the interest thereafter being recoverable not by the terms of the contract but as damages, and the rent became uncertain and therefore there was no right of distress (*l*). It is also laid down that there must be an affirmative covenant that the mortgagor shall hold for a determinate time in order to make valid a redemise (*m*). If the mortgagee has given notice of his intention to exercise the power of sale contained in the mortgage his right to distrain will be postponed until the time has expired, after which according to the notice the power of sale is to be exercised (*n*). Where the tenancy is a tenancy

(*k*) *Hobbs v. Ontario Loan and Debenture Co.* (1890), 18 S. C. R. 488; see also *Imperial Loan and Investment Co. v. Clement* (1896), 11 Man. R. 428 and 445.

(*l*) *Klinck v. The Ontario Industrial Loan and Investment Co.* (1888), 16 Ont. 562.

(*m*) *Trust and Loan Co. v. Lawrason* (1885), 10 S. C. R. 679, at p. 706.

(*n*) R. S. O. (1897), c. 121, s. 31.

at will it comes to an end with the death of the mortgagor, and the mortgagee cannot distrain upon the heirs. The executors of the lessor may distrain for arrears of rent upon lands demised for any term or at will at any time within six months after the determination of the tenancy and while the tenant is in possession. This is provided by ss. 13 and 14 of the Trustee Act (*o*). Under the Statute 8 Anne, ch. 14, the landlord may not distrain but within six months next after the termination of the tenancy. And a mortgagee who distrains two years after the maturity of the mortgage when by a special provision in the mortgage deed the tenancy expired, was held liable in an action for illegal distress (*p*). Pending the distress, the goods taken by the mortgagee are in the custody of the law and are not liable to seizure by chattel mortgagees or execution creditors so long as no fraud is on foot and no contention or contrivance exists to prejudice chattel mortgagees (*q*).

An attornment clause in a mortgage is valid if it constitute a real relation of landlord and tenant between the mortgagee and the mortgagor, and a distress levied for the rent is good, though the rent reserved is sufficient during the term specified in the mortgage, viz. ten years to repay the principal money and interest thereon at seven per cent. (*r*).

Limitations of the Right of Distress.

The right given by the statutory distress clause being merely a personal licence, the mortgagee cannot distrain any goods other than those of the mortgagor. This no doubt was always the law (*rr*). But to remove doubt the Legislature by s. 15 of the Act respecting Mortgages of Real Estate enacted that under mortgages made after the 25th day of March, 1886, the right of a mortgagee to distrain for interest in arrear upon a mortgage should be limited to the goods and chattels of the

(*o*) R. S. O. (1897), c. 129.

(*p*) *Klinck v. The Ontario Industrial Loan and Investment Co.* (1888), 16 Ont. 562.

(*q*) *Anderson v. Henry* (1898), 29 Ont. 719.

(*r*) *Massey-Harris Co. v. Young*, 37 N. B. R. 107.

(*rr*) *Edmonds v. Hamilton Provident and Loan Society* (1891), 18 O. A. R.

mortgagor (*s*). This section has been held to apply to a case of a mortgagee who by express stipulation in his mortgage deed stands in the relation of landlord to his mortgagor (*ss*).

In Ontario under s. 31 of the Landlord and Tenant Act (*t*), a landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent and certain other persons described in the section, although the goods are found on the premises (*tt*). The power to distrain for arrears of instalments is at most a mere licence under which the defendants could not justify the seizure of any goods but those of the licensor. The same may be said of the power contained in the short statutory form to distrain for arrears of interest, which in this Court and in the Supreme Court has been held, even where found in connection with an attornment clause, not to confer upon the mortgagees the rights of a landlord (*u*). Whatever may be thought of the soundness of that decision, the Act respecting Mortgage of Real Estate (R. S. O., 1897, c. 121, s. 15) now expressly enacts that the right of the mortgagee to distrain for interest in arrears shall be limited to the goods and chattels of the mortgagor. This section has also, I think, the effect of limiting in the same way any right of distress which the mortgagees might otherwise have had under another clause in the mortgage, by which the mortgagors "attorn to and become tenants at will to the mortgagees at a rent equal in amount to the interest reserved payable at the time mentioned in the proviso." I think the intention was to reach every case in which the mortgagee, whether in the character of landlord or licensee, but still under the mortgage, had the right to distrain. The section is wide enough to cover every case (*x*).

In Manitoba it has been held otherwise (*y*). The right of

(*s*) R. S. O. (1897), c. 121.

(*ss*) *Edmonds v. Hamilton Provident Loan Society*, *supra*.

(*t*) R. S. O. (1897), c. 170.

(*tt*) *Edmonds v. Hamilton Provident and Loan Society* (1891), 18 Ont. App. 347, *per* Osler, J., at p. 358.

(*u*) *Trust and Loan Co. v. Lawrason*, 10 S. C. R. 679.

(*x*) *Edmunds v. Hamilton Provident and Loan Society* (1891), 18 Ont. App. 347, *per* Osler, J., at page 358.

(*y*) *Linstead v. Hamilton Provident and Loan Society* (1896), 11 Man. R. 199.

the mortgagee to distrain for interest due upon the mortgage is limited to the goods and chattels of the mortgagor only, and as to such goods and chattels to such only as are not exempt from seizure under execution. The Act respecting Distresses and Extra-judicial Seizures (*z*). It has been held, however, that this section has no reference to the right of a mortgagee to distrain for rent under a tenancy validly created, but only to the right to distrain for interest as such under the ordinary distress clause contained in the Act respecting Short Forms of Indentures (*a*). This is identical with that contained in the Ontario Act.

Where a mortgage deed contains a provision that the mortgagee may distrain for arrears of interest, and also an attornment clause by which the mortgagor becomes a tenant of the mortgagee, and the mortgagee distrains for arrears of interest, but not for rent as such on the crops of a lessee of the mortgagor, the distress is wholly illegal, for the defendant can only take the goods of the mortgagor for arrears of interest (*b*).

In Ontario the goods and chattels exempt from seizure under execution shall not be liable to seizure by a landlord for rent in respect of a tenancy created after the 1st day of October, 1887, s. 30 Landlord and Tenant Act (*c*). But a tenant who is in default for non-payment of rent and claims the benefit of the exemption from distress to which he is entitled under that Act, must give up possession of the premises forthwith or be ready and offer to do so (*d*).

Where the mortgagee has the right to distrain for arrears of interest or rent he is limited as between the parties, and against the lands to six years' arrears. Sec. 17 of the Real Property Limitation Act (*e*) is as follows:—

(17) No arrears of rent or of interest in respect of any sum

(*z*) R. S. Man. (1902).

(*a*) *Linstead v Hamilton Provident and Loan Society* (1896), 11 Man. R. 199.

(*b*) *Millar v. Imperial Loan and Investment Co.* (1896), 11 Man. R. 247; 16 C. L. T. 298; see also *Edmonds v. Hamilton Provident and Loan Society* (1891), 18 Ont. App. 347.

(*c*) R. S. O. (1897), c. 170.

(*d*) Landlord and Tenant Act, s. 32. See also the Execution Act, R. S. O. (1897), c. 77, ss. 2 and 3.

(*e*) R. S. O. (1897), c. 133.

of money charged upon or payable out of any land or rent or in respect of any legacy or any damages in respect of such arrears of rent or interest shall be recovered by any distress or action, but within six years next after the same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent.

This section does not limit the amount of arrears of interest recoverable in an action on the covenant for payment. In mortgages made before the 1st day of July, 1894, twenty years' arrears, and in mortgages made after that date ten years' arrears are recoverable by action on the covenant (*f*). As against creditors of the mortgagor the right of the mortgagee is further limited to one year's arrears by the Act respecting Mortgages of Real Estate (*g*). In Manitoba, the landlord is limited to three months' arrears of rent where the same is payable quarterly or more frequently, and to one year's arrears when the same is payable less frequently than quarterly as against any writ of execution or attachment issued out of any Court of that Province (*h*).

An attornment clause in a mortgage is valid if it constitute a real relation of landlord and tenant between the mortgagee and mortgagor, and a distress levied for the rent is good, though the rent reserved is sufficient during the term specified in the mortgage, viz. ten years, to repay the principal money and interest thereon at seven per cent. (*i*).

A mortgagor let the mortgaged premises subsequently to the mortgagee. The mortgagees gave a notice to the tenant informing him of the mortgage, and requiring him to pay to them all rent due and payable under the lease. Held, that the notice did not make the tenant the tenant of the mortgagee, and was not an adoption by the mortgagee of the lease within sect. 15, c. 83, C. S. (*k*).

(*f*) R. S. O. (1897), c. 72, s. 1.

(*g*) R. S. O. (1897), c. 121, s. 16.

(*h*) R. S. Man. (1891), c. 46, s. 3.

(*i*) *Massey Harris Co. v. Young* (1905), 37 N. B. R. 107.

(*k*) *Brock v. Forster* (1897), 34 N. B. R. 262.

A mortgage of land contained a special attornment clause whereby the mortgagor became tenant of the land to the defendants at a yearly rental equal to the interest on the amount of the loan to be paid at the times appointed for the payment of interest. The mortgage was not executed by the mortgagee. Held, that the relationship of landlord and tenant was validly created between the parties, and that on default of any payment of interest the mortgagee might distrain for a year's rent under the attornment clause, and take any goods upon the premises whether belonging to the mortgagor or not, and make a valid sale (*l*).

DISTRESS

"It is well settled by authority that it is competent for the parties to a mortgage of real property to agree that in addition to their principal relations as mortgagor and mortgagee they shall also, as regards the mortgaged lands, stand towards each other in the relation of landlord and tenant, the mortgagor thus remaining in possession as the tenant of the mortgagee. It is essential to the validity of such an arrangement that it should be so carried out as to comply with the requirements of the law prescribed for the creation of leases, and it should appear that it was really the intentions of the parties to create a tenancy at the rent reserved and not merely to give the mortgagee under colour or pretence of the lease an additional security incidental to his character of mortgage. If these conditions are complied with, the relation of lessor and lessee is considered to be established, not only as between the parties themselves, but in respect of third persons also. In such a case the mortgagee, if not restricted by statute, may distrain for rent in arrear upon the goods of the mortgagor and also upon the goods of a stranger found upon the mortgaged or demised lands, and may

(*l*) *Linstead v. Hamilton Provident and Loan Society* (1896), 11 Man. L. R. 199.

insist as against the sheriff and the execution creditors of the mortgagor upon the rights conferred on landlords by the statute 8 Anne, ch. 14" (a).

Apart from the relation of landlord and tenant there may be a simple stipulation in the mortgage deed that the mortgagee may distrain. The right to distrain arises by implication as incident to the relation of landlord and tenant. No set form of words is necessary to give the mortgagee the right to distrain. The mortgage deed may provide that the mortgagee may distrain for all the mortgage moneys, principal as well as interest, and this without regard to the value of the land and whether the goods are on the mortgaged premises or elsewhere. As between the parties there is no doubt that such a stipulation is perfectly valid (b). In Ontario the usual form of stipulation is the statutory distress clause contained in the Act respecting Short Forms of Mortgages (c).

(15) Provided that the mortgagee may distrain for arrears of interest. If the mortgage deed is expressed to be made in pursuance of the Act this form of words shall be taken to have the same effect and be construed as if the mortgage deed contained the following form.

(15) And it is further covenanted declared and agreed by and between the parties to these presents, that if the said mortgagor his heirs, executors or administrators shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee his heirs executors administrators or assigns to distrain therefor upon the said lands tenements hereditaments and premises or any part thereof and by distress warrant to recover by way of rent reserved as in the case of a demise, of the said lands, tenements, hereditaments and premises, so much of such interest as shall from time to time, be, or remain in arrear or unpaid, together

(a) *Hobbs v. The Ontario Loan and Debenture Co.* (1890), 18 S. C. R. 483, per Strong, J. (now C.J.), at p. 493; *M'Kay v. Grant* (1893), 30 C. L. J. 70. And see the article by Mr. A. H. Marsh, Q.C., in 6 C. L. T.

(b) *Hobbs v. The Ontario Loan and Debenture Co.* (1890), 18 S. C. R. 483, per Patterson, J., at p. 522.

(c) R. S. O. (1897), c. 126, Schedule B, clause 15.

with all costs charges or expenses attending such levy or distress as in all cases of distress for rent (*d*).

This clause does not create the relation of landlord and tenant between the mortgagor and mortgagee, but operates simply as a personal license from the mortgagor to the mortgagee that it shall be lawful for the latter to distrain upon the goods of the former (*e*). It would seem from the provisions of the statutory clause that the mortgagee may exercise his right to distrain at any time whether before or after the maturity of the mortgage debt or of any instalment thereof. A mortgage contained the statutory proviso for distress and a special provision leasing the lands to the mortgagor till the 20th June, 1886, at a rent equal to the amount of interest as stipulated for in the proviso for redemption. In an action for illegal distress it was held that only arrears of interest which shall have accrued before the maturity of the mortgage debt can be distrained for in cases where there is no provision in the mortgage for payment of interest after maturity, and as the distress was made more than six months after the expiry of the tenancy, the distress for the rent was illegal. The interest payable after maturity of the principal would be recoverable not by the terms of the contract but as damages, and the right to distrain under the statutory power is given only where the mortgagor makes default in payment at the time limited therefor (*f*). A mortgagee having made a first seizure for arrears of interest and abandoned the seizure cannot seize a second time for the same demand. A seizure for more than is due is illegal (*g*).

(*d*) Schedule B, clause 15.

(*e*) *Trust and Loan Co. v. Lawrason* (1882), 10 S. C. R. 679, and at p. 294, 6 O. A. R.

(*f*) *Klinck v. The Ontario Industrial Loan and Investment Co.* (1888), 16 Ont. 562; *Powell v. Peck* (1888), 15 Ont. App. 138; *Laing et al v. Ontario Loan and Savings Company* (1881), 46 U. C. R. 114.

(*g*) *La Vassaire v. Heron* (1880), 45 U. C. R. 7.

CHAPTER VIII.

Of the recovery of Annual Sums charged on Land or its Income.

	PARAGRAPH	Paragraph
<i>Statutory remedies</i>	925	925
<i>Discretionary power of court to sell for payment of arrears</i>	926	

925. By the 44th section of the Conveyancing and Law of Property Act, 1881, c. 41, a person claiming under any instrument coming into operation after December 31st, 1881, and so far as a contrary intention is not expressed thereby, and subject to the terms and provisions thereof, to receive out of any land, or out of the income of any land, any annual sum, whether charged on the land or its income, by way of rent-charge or otherwise, not being rent incident to a reversion, is entitled, subject to all prior estates, interests and rights, to the following remedies for recovering and compelling payment of the same, so far as such remedies might have been given by the instrument under which the annual sum arises, but not further :—

To enter into and distrain the land charged, or any part thereof, if at any time the annual sum, or any part thereof, is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, and to dispose according to law of any distress found ; to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

To enter into possession of and hold (without impeachment of waste) the land charged, or any part thereof, if at any time the annual sum, or any part thereof, is unpaid for forty days next after the time appointed for any payment in respect thereof, although no legal demand has been made for payment ; and to take the income of the land, until thereby or otherwise the annual sum and all arrears due at the time of entry, or becoming due during possession, and all costs and expenses occasioned by non-payment of the annual sum are fully paid.

In the like case, whether taking possession or not, by deed, to demise the land charged, or any part thereof, to a trustee for a

Paragraphs
925—926

term of years with or without impeachment of waste ; on trust by mortgage, sale or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of these means, or any other reasonable means, to raise and pay the annual sum and all arrears thereof due, or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, including the costs of the preparation and execution of the deed of demise, and of the execution of the trust of that deed ; and the surplus, if any, of the money raised, or of the income received under the trusts of that deed, shall be paid to the person for the time being entitled to the land in reversion immediately expectant on the term thereby created.

It will be observed that the first part of this enactment recognizes the distinction between annual sums charged upon the land, and those which are charged upon the income of the land ; but the remedies given only affect the “ land charged.” The question will, therefore, probably arise whether or to what extent the Act applies when the charge is only on income. As it is clearly the intention of the Act to give some remedy to the person entitled to a charge of the latter kind, it is probable that the 2nd and 3rd sub-sections, which give powers of distress and entry, will be held to apply ; but it seems very unlikely that the authority to demise the land itself for a term, with powers to mortgage, sell or demise the term could be used to secure such a charge. The words “ as far as these remedies might have been conferred by the instrument under which the annual sum arises, but not further,” may possibly have some bearing on the question, but their meaning is not apparent.

Discretionary
power of
court to sell
for payment
of arrears.

926. The court also has a discretionary power to order a sale of the land for the purpose of providing for the arrears of a legal rent-charge, whether the corpus of the land (as distinguished from the rents and profits) is or is not charged with the rent-charges (*a*).

(*a*) *Hambro v. Hambro*, [1894] 2 Ch. 564.

CHAPTER IX.

Of the Right of the Creditor to Sell the Mortgaged Property.

Section I.—Sales under Powers incident to the Security.

,, II.—Sales under Express or Statutory Powers.

SECTION I.

Sales under Powers incident to the Security.

	PARAGRAPH	Paragraphs
<i>Liability of property to be sold</i>	927	927—928
<i>Mortgagee or pledgee may sell ex mero motu</i>	928	
<i>Mere possessory lien gives no right of sale</i>	929	
<i>Solicitor's lien confers no power of sale</i>	930	
<i>Innkeeper may sell goods deposited</i>	931	
<i>Persons exercising power of sale must account for surplus purchase money</i>	932	

927. The property mortgaged or pledged may become liable to be sold for the purpose of discharging the debt, either by the creditor himself *ex mero motu* or by judicial process. This chapter will be confined to sales by the creditor himself either

Liability of
property to
be sold.

- (1.) Under a power which the law annexes to his security as a legal incident thereto ; or
- (2.) Under an express power contained in the instrument creating the security or implied therein by virtue of some statute.

928. The first kind of power of sale is vested (a) in a mortgagee or pledgee of a *personal chattel, or of stock, a policy of insurance, or other chose in action*, who, by virtue of the implied contract that

Mortgagee
or pledgee of
chattel may
sell *ex mero
motu*.

(a) *Lockwood v. Ewer*, 2 Atk. 303 ; *Kemp v. Westbrook*, 1 Ves. Sen. 278 ; *Harrison v. Franks*, 2 Eq. Ca. Abr. 725 ; *Wilson v. Tooker*, 5 Bro. P. C. 193 ; *Pothenier v. Dawson*, Holt, N. P. R. 383 ; *Dyson v. Morris*, 1 Hare, 413 ; *Pigot v. Cubley*, 15 C. B. (N.S.) 701 ; *Story*, Bailm. §§ 308, 309. As to sale by mortgagees of stocks, see *Stubbs v. Slater*, [1910] 1 Ch. 195. So by the Roman Law, Mackeldey, Syst. Jur. Rom. s. 316 ; see *Martin v. Reid*, 11 C. B. (N.S.) 730. The Larceny Act of 1861, after providing for the punishment of fraudulent sales and pledges by agents, bankers and factors, declares, that nothing in the Act relating to agents shall affect any mortgagee of real or personal property in respect of any act done in relation to the property comprised in or affected by the mortgage ; nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money which shall be or become actually due or payable by virtue of any valuable security ; nor from selling, transferring or disposing of any securities or effects in his possession upon which he shall have any lien, claim or demand entitling him by law to do so, unless such sale, transfer or other disposal requisite for satisfying such lien, claim or demand. (24 & 25 Vict. c. 96, s. 75 ; and see s. 76.)

Paragraphs
928—931

the pledge shall be made effectual to discharge the debt (197), is entitled without any express power to sell the subject of the security *ex mero motu* (subject to the statutory provisions concerning sales by pawnbrokers) (1045), upon non-payment of the debt, when a day has been fixed for the payment; but where no day has been fixed only after the debt is payable, and after a proper demand and notice (b), and the lapse of a reasonable time (c). The headnote in a case of *Pigot v. Cubley* (d) states that a notice demanding more than is due is not a proper notice in the case of a pledge; but the case itself does not bear this out, and, anyhow, a mistake as to the amount does not invalidate a notice in case of a mortgage of stock (e).

Mere
possessory
lien gives no
right of sale.

929. But the holder of a chattel under a specific possessory lien (583), having a mere personal right which continues only during possession, and out of which arises no such contract as is implied in the case of a pawn, cannot sell, but has only a right of retainer (f); and if he sell he will become liable in trover for the value. This rule applies also to the lien upon a chattel for unpaid purchase-money (g), but it is subject to exceptions; as in the tea trade, where it is the custom for the vendor to be paid partly by an immediate deposit, while the vendor retains the tea, or the warrants which represent it, and on non-payment of the balance may sell and charge the purchaser with the deficiency, together with interest and other charges: though on the purchaser's bankruptcy, the vendor is not bound to sell of his own authority but may properly apply for an order in bankruptcy (h).

Solicitor's
lien confers
no power of
sale.

930. The lien of a solicitor upon his client's papers, though a general lien, also confers a mere right of retainer (631—659), and if he sell, or concur in a sale of the documents, he will be liable in trover, or for the proceeds of the sale (i).

Innkeepers
may sell
goods
deposited.

931. A partial exception to this rule, which formerly enabled an innkeeper by the customs of London (j) and Exeter (k), to sell

(b) *Story*, Bailm. § 308; *Langton v. Waite*, L. R. 6 Eq. 165; *Burdick v. Sewell*, 13 Q. B. D. 159, 162; on appeal (*sub nom. Sewell v. Burdick*), 10 App. Cas. 74; *France v. Clark*, 22 Ch. D. 830; *Re Richardson*, *Shillito v. Hobson*, 30 Ch. D. 396, 403; *Exp. Hubbard, re Hardwick*, 17 Q. B. D. 690, 698; *Re Morritt, Exp. Official Receiver*, 18 Q. B. D. 222.

(c) *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579; and cf. *Re Harrison and Ingram, Exp. Whinney*, 54 W. R. 203.

(d) 15 C. B. (N.S.) 701.

(e) *Stubbs v. Slater*, [1910] 1 Ch. 632; and see also *Harrold v. Plenty*, [1901] 2 Ch. 314.

(f) *Thames Ironwork Co. v. Patent Derrick Co.*, 1 Johns. & H. 93; *Clark v. Gilbert*, 2 Bing. N. C. 343. Per PARKE, B., *Legg v. Evans*, 6 Mee. & W. 36; *Mulliner v. Florence*, 3 Q. B. D. 484.

(g) Per BULLER, J., in *Lickbarrow v. Mason*, 6 East, at p. 24, n.

(h) *Exp. Moffatt*, 1 Mont. D. & De G. 282, aff. on appeal, 2 Mont. D. & De G. 170; *Exp. Twining*, 1 Mont. D. & De G. 691.

(i) *Clark v. Gilbert*, 2 Bing. N. C. 353.

(j) *Jones v. Pearle*, 1 Str. 557; *Robinson v. Walter*, 3 Bulst. 269; *Mosse v. Townsend*, 1 Bulst. 207; *Case of Hostler*, Yelv. 66.

(k) *Cross on Lien*, 343.

a horse in order to satisfy a debt due for his keep, has been extended by the Innkeepers Act, 1878 ; which provides that the landlord, proprietor, keeper or manager of any hotel inn or licensed public-house, shall, in addition to his ordinary lien, have the right absolutely to sell and dispose by public auction of any goods, chattels, carriages, horses, wares, or merchandise, which may have been deposited with him, or left in the house he keeps, or the coachhouse, stable, stable-yard or other premises, appurtenant or belonging thereto, where the person depositing or leaving the same shall be or become indebted to the innkeeper for any board or lodging, or for the keep and expenses of any horses or other animals, left with or standing at livery in the stables or fields occupied by such innkeeper. No sale is to be made until after the things have been left in such charge for six weeks; without payment of the debt ; and the innkeeper, after having paid himself the debt, costs and expenses out of the proceeds of the sale, is to pay the surplus, on demand, to the person by whom the things were left or deposited, and the debt shall not be any other or greater debt than the debt for which the things could have been retained under the lien. A month's notice of the intended sale must be given by advertisement in one London and one country newspaper, circulating in the district, giving shortly a description of the goods and chattels intended to be sold, with the name of the owner or person who deposited or left the same when known.

Paragraphs
931—932

932. The mortgagee or pawnee of chattels, who sells either under a special or implied power, is bound to account for the proceeds, to pay over to the owner the surplus purchase-money beyond his demand, and the necessary charges and expenses, and to return any unsold part of the security to the debtor ; and if he attempt to dispose of the money so as to prejudice any person entitled to receive it, he may be ordered to pay it into court, and a receiver may be appointed of the proceeds of any part of the property which may remain unsold (*l*) (1743).

Persons
exercising
power of
sale must
account for
surplus
purchase
money.

SECTION II.

Sale under Express or Statutory Powers.

	PARAGRAPH
<i>Right of sale may be created by a trust for, or a power of sale</i>	933
<i>Power of sale not waived by a joint appointment of a receiver</i>	934
<i>Power of sale must not be used for fraudulent purposes</i>	935
<i>Exercise of power of sale may be stopped</i>	936
<i>Certain persons unable to purchase mortgaged property</i>	937
<i>Conveyancing and Law of property Act, 1881, does not authorize sale of surface only, unless by leave of the court</i>	938
<i>Mode of sale</i>	939
<i>Conditions of sale</i>	940

(*l*) Story, Bailments, § 343 ; *Wilson v. Tooker*, 5 Bro. P. C. 193 ; Com. Dig. Mortgage B. ; *Harrison v. Hart*, 2 Eq. Cas. Abr. 6.

Paragraph		PARAGRAPH
933	<i>Preparation of particulars</i>	941
	<i>Mortgagee selling must strictly keep to his power</i>	942
	<i>Should endeavour to obtain best price</i>	943
	<i>Joint sales</i>	944
	<i>Whether purchase money must be actually paid</i>	945
	<i>Cheque may be accepted for deposit</i>	946
	<i>Sale not set aside because first mortgagee after negotiations bought up second mortgagee</i>	947
	<i>Power of sale should be given to mortgagee and his personal representative</i>	948
	<i>Devolution of the express power of sale</i>	949
	<i>Where first and second mortgagee each have power to sell they may concur</i>	950
	<i>Upon a transfer of the security the continuance of power of sale should be provided for</i>	951
	<i>Collateral securities may be included in power of sale</i>	952
	<i>Mortgaged property cannot be sold without notice to mortgagor</i>	953
	<i>The sale not generally impeached if notice not given</i>	954
	<i>Mode of serving notice</i>	955
	<i>If object of notice otherwise attained its irregularity may be disregarded</i>	956
	<i>Notice required before exercise of statutory power</i>	957
	<i>Mortgagee may convey property for such estate and interest as is the subject of the mortgage</i>	958
	<i>Does not provide for outstanding nominal reversion in mortgages by sub-demise</i>	959
	<i>Effect of covenant by mortgagor to join in sale</i>	960
	<i>Title of purchaser under Conveyancing Act of 1881, not to be impeached for irregularity</i>	961
	<i>Purchaser entitled to know terms of power of sale</i>	962
	<i>Mortgagee holds balance of purchase moneys in trust for mortgagor</i>	963
	<i>Interest in surplus purchase moneys</i>	964
	<i>Disposal of surplus purchase money after death of mortgagor</i>	965
	<i>Statutory provision may be varied by deed</i>	966
	<i>Right to foreclose</i>	967
	<i>Mortgagee not answerable for involuntary loss</i>	968
	<i>Persons to exercise power entitled to same title deeds as a purchaser</i>	969
	<i>Mortgagee's receipt sufficient discharge</i>	970
	<i>Money received under mortgage to be applied as proceeds of sale</i>	971
	<i>Lord Cranworth's Act (23 & 24 Vict. c. 145) repealed</i>	972
	<i>Summary of power conferred by Lord Cranworth's Act which still applies to securities made before 1882</i>	973
	<i>Lord Cranworth's Act does not apply to instruments made before Aug. 28th, 1860</i>	974
	<i>Comparison of the powers conferred by Lord Cranworth's Act and Conveyancing Act</i>	975
	<i>Effect of power contained in schedule to 25 & 26 Vict. c. 53</i>	976
	<i>Purchaser may be registered as first proprietor under Land Transfer Acts, 1875 and 1897</i>	977
	<i>First mortgagee of ship has absolute power of sale</i>	978
	<i>Pawnbroker must sell by auction but may himself purchase</i>	979

Right of sale may be created by a trust for, or a power of sale.

933. An express right in the mortgagee to sell may be created either by a trust for sale on default of payment at the time fixed, or by a power; and generally, but not necessarily, the trust or power is directed not to be exercised until the expiration of a previous notice to the owner of the equity of redemption, so that he may have a further opportunity of saving the estate by payment of the debt.

Of these forms of security the most usual and the safest is the power of sale; for although a security by way of trust (whether the trust be vested in the creditor or in a third person to secure the debt, and subject thereto for the mortgagor) is substantially a mortgage, and does not create an express trust for the benefit of the mortgagor, but falls within the ordinary provision of the Statute of Limitations (*m*) relating to mortgages (*n*), it is yet subject to incidents of the law of trusts which may cause serious inconvenience both to the mortgagor and the mortgagee (*o*). In particular it is not subject to the remedy by foreclosure (*16*).

Paragraphs
933—936

934. The power will not be affected by a joint demise made by the mortgagor and mortgagee to a receiver, upon trust at the request of the mortgagee during the continuance of the security, and afterwards of the mortgagor, to grant leases, but to permit the mortgagor to receive the rents until default, and after default to receive and apply them in keeping down the interest. The receiver in such a case will be bound to join in conveying to a purchaser from the mortgagee under the power, without the concurrence of the mortgagor (*p*).

Power of sale
not waived
by joint
appointment
of a receiver.

935. The power is given to the mortgagee for his own benefit, to enable him the better to realize his debt, and it must not be used for fraudulent purposes. But the court will not interfere merely to prevent its exercise contrary to the wishes or interests of the mortgagor, or even (it has been said) because the mortgagee is seeking some collateral object and not merely the payment of his debt; for the mortgagee is not a trustee of the power for the mortgagor, and the court will not inquire into his motives for exercising it (*q*), so long as he acts fairly and *bonâ fide* (*r*). This rule appears to be equally applicable (but always, of course, in the absence of fraud) where, instead of the usual power in a mortgage deed, the security is in the form of a trust for sale (*s*) (*742*).

Power of sale
must not be
used for
fraudulent
purposes.

936. The pendency of a suit to redeem by a *puisne* incumbrancer, who has commenced it after his offer to redeem has been refused, and his right to do so denied, and who has made out a *primâ facie* title as an incumbrancer, will be ground for preventing the exercise

Exercise of
power of sale
may be
stopped.

(*m*) 3 & 4 Will. 4, c. 27, s. 28. See Real Property Limitation Act, 1874 (c. 57), s. 7.

(*n*) *Kirkwood v. Thompson*, 2 H. & M. 392; *Locking v. Parker*, L. R. 8 Ch. 30; *Re Alison, Johnson v. Mounsey*, 11 Ch. D. 284; *Warner v. Jacob*, 20 Ch. D. 220.

(*o*) See *Anon.*, 6 Mad. 10.

(*p*) *King v. Heenan*, 3 De G. M. & G. 890.

(*q*) *Jones v. Matthie*, 11 Jur. 504, reversing *Matthie v. Edwards*, 2 Coll. C. C. 465; *Warner v. Jacob*, 20 Ch. D. 220; *Nash v. Eads*, 25 Sol. J. 95 (overruling *dicta* of STUART, V.-C., in *Robertson v. Norris*, 1 Giff. 421; 4 Jur. (N.S.) 155); *Colson v. Williams*, 58 L. J. Ch. 539.

(*r*) See *Hodson v. Deans*, [1903] 2 Ch. 647.

(*s*) *Re Alison, Johnson v. Mounsey*, 11 Ch. D. 284. And see *Warner v. Jacob*, 20 Ch. D. at p. 223, *per* KAY, J.

Paragraphs
936—937

of the power (*t*), which may also be stopped by payment into court of the sum claimed to be due (*u*), or even by tender of it at the sale (*x*); but not by merely commencing an action to redeem (*y*); although after *decree nisi* for foreclosure, it can only be exercised by leave of the court (967). And if after demand of payment, the sale be stopped upon receipt of a bill for the debt, and the bill be afterwards dishonoured, the right of sale and the running of the notice having been only suspended, revive, and the power may be exercised without giving a new notice (*z*).

The court will prevent a sale which would expose the mortgagor to liability under a contract made before the mortgage, and of which the mortgagee had notice (*a*).

Certain
persons
unable to
purchase
mortgaged
property.

937. The mortgagee (whether he claims under an ordinary power or under a trust for sale) "cannot sell to himself either alone or with others, nor to a trustee for himself, nor to any one employed by him to conduct the sale" (*b*), unless the sale is made by the court, and he has obtained leave to bid (*c*). "For a sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value" (*b*); and if the mortgagee be a trustee, he will not have leave to bid where the *cestui que trust* objects, unless attempts to sell to others have failed (*d*). The same rule applies to a pledgee (*e*), and also to the solicitor or other agent who is acting for the mortgagee or pledgee in the matter of the sale (*f*). And even the employment by the purchaser of the clerk of the mortgagee's solicitor as a bidder, has been held sufficient to invalidate the sale, and to throw upon the purchaser the costs of a redemption suit so far as they were caused by the sale (*g*). But the rule was held not to apply to the solicitor of a person who, having an interest in the estate, has obtained leave to attend the proceedings in the action, the solicitor having had nothing to do with the sale or the conduct of it, and having never been consulted about it (*h*); nor to the solicitor who acted in the matter of the

(*t*) *Rhodes v. Buckland*, 16 Beav. 212.

(*u*) *Whitworth v. Rhodes*, 20 L. J. Ch. 105.

(*x*) *Jenkins v. Jones*, 2 Giff. 99.

(*y*) *Adams v. Scott*, 7 W. R. 213.

(*z*) *Wood v. Murton*, 47 L. J. Q. B. 191.

(*a*) *De Mattos v. Gibson*, 5 Jur. (N.S.) 347.

(*b*) *Per LINDLEY, L.J., Farrar v. Farrars, Ltd.*, 40 Ch. D. at p. 409; *Martinson v. Clowes*, 21 Ch. D. 857, and on appeal, 52 L. T. 706; *Hodson v. Deans*, [1903] 2 Ch. 647.

(*c*) *Downes v. Grazebrook*, 3 Mer. 200; *Re Bloye's Trust*, 1 Mac. & G. 488; *National Bank of Australasia v. United Hand in Hand, etc., Co.*, 4 App. Cas. 391; *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395, 409.

(*d*) *Tennant v. Trenchard*, L. R. 4 Ch. 537.

(*e*) *Story, Bailments*, § 319.

(*f*) *Whitcomb v. Minchin*, 5 Mad. 91; *Martinson v. Clowes*, 21 Ch. D. 857.

(*g*) *Parnell v. Tyler*, 2 L. J. (N.S.) Ch. 195.

(*h*) *Guest v. Smythe*, L. R. 5 Ch. 551. And see *per* JOYCE, J., *Hodson v. Deans*, *supra*, at p. 652.

mortgage but not in the matter of the sale (*i*). Nor does it apply to an execution creditor, because the sheriff is the seller (*j*); nor to a creditor who is made a trustee for sale in order to secure the debt, but who has never attempted to execute the trust (*k*); nor to one of several co-mortgagors (*l*). And a *puisne* mortgagee, though his own security be in the form of a trust for sale, may buy from the prior mortgagee selling under his power, and may in all respects, as if he were a stranger to the estate, acquire an irredeemable title (*m*); provided he have not used his position as mortgagee to get an undue advantage, or have otherwise acted *mala fide* (*n*); and the same rule applies where mortgagees sell to persons who are transferees of part of their debt (*o*). One of several tenants in common who own equity of redemption may purchase for himself exclusively (*p*).

938. The power of sale which is vested in mortgagees, by the Conveyancing and Law of Property Act, 1881, c. 41, being for the most part in the form in which an express power of sale is framed, may, to avoid repetition, be conveniently stated and noticed in this place.

Paragraphs
937—938

Power of sale implied by Conveyancing and Law of Property Act, 1881, does not authorize sale of surface only.

The Act provides (*q*), that, *where the mortgage is made by deed* executed after the commencement of the Act (January 1st, 1882), and if and so far as contrary intention is not expressed (*r*) by, and subject to the terms and provisions of the deed (**966**), an original mortgagee, and any person deriving title under him (*s*), and any person for the time being entitled to receive and give a discharge for the mortgage money (*t*), has a power to the like extent as if it had been in terms conferred by the mortgage deed, *when the mortgage money has become due*, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof (*u*), either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions,

(*i*) *Nutt v. Easton*, [1900] 1 Ch. 29.

(*j*) *Stratford v. Twynam*, Jac. 418.

(*k*) *Chambers v. Waters*, 3 Sim. 42; *Waters v. Groom*, 11 Cl. & F. 684.

(*l*) *Kennedy v. De Trafford*, [1896] 1 Ch. 762, affirmed (H.L.), [1897] A. C. 180.

(*m*) *Shaw v. Bunney*, 33 Beav. 494, *dub.* Turner, L.J., affirmed 2 De G. J. & Sm. 468; *Kirkwood v. Thompson*, 2 H. & M. 392. See *Parkinson v. Hanbury*, 1 Dr. & Sm. 143; but the trust there was not part of the security.

(*n*) *Per* KNIGHT-BRUCE, L.J., in *Shaw v. Bunney*, *supra*.

(*o*) *Flower v. Pritchard*, 53 Sol. J. 178.

(*p*) *Kennedy v. De Trafford*, *supra*, explaining *Farrar v. Farrars, Ltd.*, 40 Ch. D. 395, and dissenting from *Van Horne v. Fonda*, 5 Johns. Chy. (N. Y.) 388.

(*q*) Section 19.

(*r*) The mere fact that the mortgage contains an express power exercisable at a future date was held by STIRLING, J., not to be an expressed contrary intention so as to negative the earlier exercise of the statutory power (*Life Interest, etc., Corporation v. Hand in Hand Fire and Life Insurance Society*, [1898] 2 Ch., at p. 239).

(*s*) Section 2 (*vi.*).

(*t*) Section 21 (4). These words, however, do not confer the power of sale on an agent with a power of attorney to receive and give effectual discharges for the mortgage debt (*Re Dowson and Jenkins's Contract*, [1904] 2 Ch. 219).

(*u*) This includes an implied easement over the part remaining unsold (*Born v. Turner*, [1900] 2 Ch. 211).

Paragraphs
938—940

respecting title or evidence of title, or other matter, as he thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby (v). The power to sell "any part" of the property only applies laterally and not vertically, so that mines cannot be sold apart from the surface or *vice versâ*. However, by the Confirmation of Sales Act, 1862, such sales were authorized with the leave of the court. This Act was repealed by the Trustee Act, 1893, and re-enacted by s. 44 of the latter Act, but in such words as to be applicable only to sales by trustees and not by mortgagees. This omission was, however, supplied by the Trustee Act, 1894 (x), so that now by leave of the court such sales can be made. The application for such leave is made by petition (y), which must be served on all subsequent incumbrancers (z). The power does not enable the mortgagee to sell fixtures apart from land (a); nor does it extend to debentures issued by companies (b); but the mortgagee may sell part, with an easement over some other part of the land (c).

Mode of
sale.

939. If only authorized to sell by public auction the mortgagee without statutory power could not sell privately; but where either mode of sale is permitted, a private sale, even without advertisement, is good, so that it be made *bonâ fide* and for a fair price (d).

Conditions
of sale.

940. The mortgagee should avoid the use of unnecessarily stringent conditions of sale. Such as are commonly used by conveyancers are, as a general rule, safe for mortgagees, who will not, however, be restrained from adding such further conditions, adapted to the state of the title, as may be reasonably used in the disposal of his property by a prudent owner, anxious to protect himself against the risk and expense of litigation; a risk which it is as much for the benefit of the mortgagor as of the mortgagee to avoid, and the proper avoidance of which outweighs the possible diminution in the number and value of the biddings which may be caused by the conditions (e).

(v) Apart from such a provision a power of sale is not extinguished by an abortive attempt to sell. (*Henderson v. Astwood*, [1894] A. C. 150, 162.)

(x) See *Re Beaumont's Mortgage Trusts*, L. R. 12 Eq. 86; *Re Wilkinson's Mortgaged Estates*, L. R. 13 Eq. 634.

(y) R. S. C., Order LIV. r. 2.

(z) *Re Hirst's Mortgage*, 45 Ch. D. 263, in which *Re Wilkinson's Mortgaged Estates*, *supra*, was dissented from on this point.

(a) *Re Yates, Batcheldor v. Yates*, 38 Ch. D. 112.

(b) *Blaker v. Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

(c) *Born v. Turner*, [1900] 2 Ch. 211.

(d) *Brouard v. Dumaresque*, 3 Moo. P. C. 457; *Davey v. Durrant*, 1 De G. & J. 535.

(e) *Hobson v. Bell*, 2 Beav. 17; *Kershaw v. Kalow*, 1 Jur. (N.S.) 974; *Falkner v. Equitable Reversionary Society*, 4 Drew 352. See *Cragg v. Alexander*, W. N. (1867) 305, as to improper conditions on sale of reversion. It is apprehended that having regard to the definition of "trust" in s. 50 of the Trustee Act, 1893, s. 14 of that Act (deprecatory conditions) has no application to sales by mortgagees.

941. Moreover, he should be very careful as to the description of the property in the particulars ; for if, by reason of a misdescription, compensation has to be allowed to a purchaser, the vendor will be liable to a *puisne* incumbrancer (and it is submitted also to the mortgagor) not necessarily for the sum paid as compensation, but for the difference between the price paid and the price which would have been gotten if the mistake had not been made (*f*).

Paragraphs
941—945

Preparation
of particulars.

942. He should adhere strictly to the terms of his power, being liable in damages to the mortgagor for any loss occasioned by irregularity in this respect. It has been held that when a purchaser buys with notice that the sale is improper, he will not be protected by a declaration that irregularity in the sale shall not affect the purchaser (*g*). In that case the sale was under an express power, and it is questionable whether the decision would be applicable to the statutory power (*h*).

Mortgagee
selling must
strictly keep
to his power.

943. The sale must also be effected with proper discretion ; for the mortgagee is bound to adopt such means as would be adopted by a prudent owner to get the best price that can reasonably be had (*i*) ; and a sale made at a fraudulent undervalue will be set aside (*j*). But the court will not set aside a sale merely on the ground that it is disadvantageous, unless the price be so low as to be in itself evidence of fraud (*k*).

Should
endeavour to
obtain best
price.

944. Mortgagees may join in selling together, different properties, or different interests in the same property, where it is clearly beneficial to do so ; but must see that the purchase-money is properly apportioned by their own valuers before the completion of the purchase. And the purchaser, having no notice that the apportionment is improper, may safely pay the shares of purchase-money to the respective owners (*l*).

Joint sales.

945. It has been generally considered, that, unless the mortgagee was authorized to accept a mortgage, the sale ought to be only for money. It has, however, been held that a contract to sell for money, may be carried out by a mortgage for the whole purchase-money except the deposit, so that the arrangement be *bona fide* (*m*). And it has been intimated that the estate may also be sold upon the terms that part of the money shall remain on mortgage, where the seller takes the risks and charges himself in account with the mortgagor with the whole purchase-money, even irrespective of a provision

Whether
purchase-
money must
be actually
paid.

(*f*) *Tomlin v. Luce*, 43 Ch. D. 191.

(*g*) *Jenkins v. Jones*, 2 Giff. 99, and *Selwyn v. Garfit*, 38 Ch. D. 273.

(*h*) See *Bailey v. Barnes*, [1894] 1 Ch. 25, and judgments in *Selwyn v. Garfit*, *supra*.

(*i*) *Ferrand v. Clay*, 1 Jur. 165 ; *Orme v. Wright*, 3 Jur. 19, 972 ; *Marriott v. Anchor Reversionary Co.*, 7 Jur. (N.S.) 155, *per* STUART, V.-C. ; affirmed 7 Jur. (N.S.) 713 ; 3 De G. F. & J. 177.

(*j*) *Davey v. Durrant*, 1 De G. & J. 535 ; and see *Colson v. Williams*, 58 L. J. Ch. 539.

(*k*) *Warner v. Jacob*, 20 Ch. D. 220.

(*l*) *Re Cooper & Allen's Contract*, 4 Ch. D. 802 ; *Hiatt v. Hillman*, 19 W. R. 694.

(*m*) *Thurlow v. Mackeson*, L. R. 4 Q. B. 97.

Paragraphs
945—949

May accept
cheque for
deposit.

Sale not set
aside because
first mort-
gagee after
negotiations
has bought
up second
mortgagee.

Power of sale
should be
given to
mortgagee
and his
personal
representa-
tive.

Devolution
of express
power of
sale.

that all arrangements made by the mortgagee shall be as binding as if made with the concurrence of the mortgagor (*n*). The declaration that the receipt of the mortgagee for any money to arise from the sale shall be a good discharge, does not make it necessary to sell for money, but it is an additional power to the mortgagee (*o*).

946. A mortgagee or his auctioneer may accept the purchaser's cheque for the deposit, and if it be dishonoured, is not liable for the costs of an abortive sale, but may add them to his security (*p*).

947. The court has refused to set aside a sale by the first mortgagee on the ground that, after making preliminary arrangements (but without a binding contract) for an advantageous sale of the property, he bought up the interest of the second mortgagee at a reduced price, without informing him of such arrangements (*q*).

948. In the rare cases in which an express power is considered desirable in lieu of the statutory power, the power should be so framed that it may be exercised not only by the original mortgagee or mortgagees, but also by those who represent them upon any change of interest. To this end it may safely be given (where there are several mortgagees) to the mortgagees and the survivors and survivor of them, his executors or administrators, and their or his assigns; or in the more concise language of the statute, any person claiming title under the original mortgagee. It is, besides, a common precaution to vest it also expressly in all persons entitled to give a receipt for the mortgage debt; which appears to be equally comprehensive; and there seems to be no good reason why, either in the statute or in an express power, both forms should be used.

949. Where under the old law a mortgage was capable of being devised, the devisees of the surviving mortgagee, where an express power was not given to assigns, could not exercise it though assigns were included among the persons entitled to give receipts, and to dispose of the proceeds of sale (*r*). And the same rule applies to the assigns of the mortgage debt where the sale is under an express power which does not expressly give it to assigns (*s*). Where it was given to two mortgagees, their heirs and assigns, and the security contained a joint-account clause, the power was held (*t*) to vest in the surviving mortgagee, on the ground of the assumed intention to

(*n*) *Davey v. Durrant*, 1 De G. & J. 535.

(*o*) *Thurlow v. Mackeson*, *supra*.

(*p*) *Farrer v. Lacy, Hartland & Co.*, 25 Ch. D. 636, affirmed 31 Ch. D. 42.

(*q*) *Dolman v. Nokes*, 22 Beav. 402.

(*r*) *Bradford v. Belfield*, 2 Sim. 264; *Cooke v. Crawford*, 13 Sim. 91; *Wilson v. Bennett*, 5 De G. & Sm. 475; *Macdonald v. Walker*, 14 Beav. 556. And see *Stevens v. Austen*, 7 Jur. (N.S.) 873. *Cooke v. Crawford* was thought by JESSEL, M.R., in *Osborne to Rowlett*, 13 Ch. D. 774, to have been overruled, but the Court of Appeal, in *Re Morton and Hallett*, 15 Ch. D. 143, did not assent to this view; and the Irish courts have expressly dissented from it. See also *Re Pixton and Tong's Contract*, 46 W. R. 187; *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690.

(*s*) *Re Rumney and Smith*, [1897] 2 Ch. 351.

(*t*) *Hind v. Poole*, 1 K. & J. 383.

make the security of the fee simple available, to the same extent and in the same manner in which the mortgagees were entitled to the money and the land. A power vested in the heirs and assigns of the surviving donee, has been long since held to pass to the devisees of the survivor (*u*). And a power to the assigns of a mortgagee, to sell and give receipts, extends to the administrator of the transferee of the mortgage, selling with the concurrence of the assignee of the legal estate (*v*).

Paragraphs
949—952

950. Where both first and second mortgagees have power to sell and to give receipts, which shall discharge the purchaser from seeing to the application of the purchase-money, they may concur in a sale; the one giving a receipt only for so much of the purchase-money as will discharge his debt, and the other for the balance (*x*).

Where first and second mortgagees each have power to sell they may concur.

951. The continuance of the power upon a transfer of the security should be provided for. It will not necessarily be extinguished because of the absence of such a provision; and a general assignment of all covenants, provisoes, etc., and of all other securities, will carry it (*y*). But on the alteration of a mortgage by a further charge and additional security, without recognition of the power, it was held that, if not extinguished, its existence was so doubtful that the purchaser might recover his deposit (*z*). It is clear, however, that the *statutory* power of sale passes to an assignee of the security (s. 2, (vi.)), and it is conceived that in these days the creation of a further charge without reference to an existing power of sale would not be held to have affected it prejudicially. Apparently the transferee may take advantage of a right to sell forthwith existing at the date of the transfer (*a*).

Upon a transfer of the security the continuance of power of sale should be provided for.

Care should also be taken, lest in transferring the power of sale to a sub-mortgagee, it be not altogether extinguished in the original mortgagee (*b*) (**1554**).

952. The power may be extended by reference in another instrument to property not specifically included in it; as where a legal mortgage with power of sale was made of part of an estate, with an agreement to deposit, when executed, the lease of the other part as a further and collateral security for the debt, which was described as secured on the former part of the estate, the power was held to affect the equitable interest of the mortgagee in the property comprised in the deposited lease (*c*). The statutory power being only applicable when the mortgage is by deed (**938**), it seems doubtful

Collateral securities may be included in power of sale.

(*u*) *Titley v. Wolstenholme*, 7 Beav. 425.

(*v*) *Saloway v. Strawbridge*, 1 K. & J. 371, affirmed 7 De G. M. & G. 594.

(*x*) *M'Carogher v. Whieldon*, 34 Beav. 107.

(*y*) *Young v. Roberts*, 15 Beav. 558.

(*z*) *Curling v. Shuttleworth*, 6 Bing. 121.

(*a*) *Per STIRLING, J., Bailey v. Barnes*, [1894] 1 Ch. at p. 32.

(*b*) See *Cruse v. Nowell*, 25 L. J. Ch. 709.

(*c*) *Ashworth v. Mounsey*, 2 C. L. R. 418.

Paragraphs
952—954

whether it would extend to such collateral security made by writing only.

The statutory power properly provides that the sale may be subject to prior charges or not. But a provision in a trust for sale of an equity of redemption, that the purchase-money shall be applied in payment of the prior mortgage, has been held sufficient to authorize a sale subject to that mortgage (*d*).

Mortgaged
property
cannot be
sold without
notice to
mortgagors.

953. By s. 20 of the Conveyancing Act, 1881, a mortgagee shall not exercise the statutory power, unless and until notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money or of part thereof for three months after such service (*e*); or some interest under the mortgage is in arrear and unpaid for two months after becoming due (*f*); or there has been a breach of some provision contained in the mortgage deed, or in the Act, and on the part of the original mortgagor (which includes any person deriving title under him entitled to redeem), or of some person concurring in making the mortgage, to be observed, or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

If in an express power the length of the notice be not specified, a reasonable notice must be given; and it seems that notice to pay on the day upon which the notice is given is not reasonable (*g*).

The sale not
generally
impeached if
notice not
given.

954. It has been said that a power to sell without notice is of an oppressive character (*h*), though at the present day it is not unusual to make non-payment on demand the only preliminary. It is, however, a breach of duty by a solicitor who becomes the mortgagee of his client, to omit a stipulation for notice in an express power of sale, without taking care that the client has a full explanation of the circumstances (*i*). But this does not apply to a mortgage for securing money presently payable, for payment of which the solicitor is giving time (*k*). And it has been held that, if it be provided that the purchaser shall not be affected by the absence of such notice, and that the mortgagor's remedy shall be by action for

(*d*) *Manser v. Dix*, 8 De G. M. & G. 703.

(*e*) *I.e.* after actual service, not after the time fixed by the notice for payment (*Barker v. Illingworth*, [1908] 2 Ch. 20).

(*f*) This includes an instalment expressed to be for principal and interest combined (*Walsh v. Derrick*, 19 T. L. R. 209).

(*g*) *Rogers v. Mutton*, 7 H. & N. 733; *Massey v. Sladen*, L. R. 4 Ex. 13. As to notice where the mortgage is an equitable mortgage of stocks or shares, see *Stubbs v. Slater*, [1910] 1 Ch. 632.

(*h*) *Miller v. Cook*, L. R. 10 Eq. 641, *per* STUART, V.-C.; and see *Schwyn v. Garfit*, 38 Ch. D. 273; considered in *Re Thompson & Holt*, 44 Ch. D. 492.

(*i*) *Cockburn v. Edwards*, 18 Ch. D. 449. It was intimated by Sir G. JESSEL, M.R., that the omission might be justified in the case of a second mortgage, but it is believed not to be usual; and the client of a solicitor-mortgagee ought certainly to be informed of it.

(*k*) *Pooley's Trustee v. Whetham* (No. 2), 33 Ch. D. 111.

damages, there is no jurisdiction to restrain the sale without notice (*l*). And unless the right to sell be vested in a trustee, whose duty binds him to give notice to both parties, the court will not generally stop the sale on the ground that the required notice has not been given, but will leave the mortgagor to bring an action to impeach the sale, and to give notice to the purchaser that he has done so (*m*). Notice to the mortgagor's executor will be sufficient, although he has no interest in the property, if the power provides that he or the heir may be served (*n*); and where the notice is to be given to assigns, a subsequent mortgagee is entitled to be served (*o*). If there be no person in existence to whom, under the terms of an express power, notice should be given, the power cannot be exercised (*p*).

Paragraphs
954—957

955. It appears unnecessary to provide that the notice shall be valid, notwithstanding the disability of the person on whom it is served (*q*); and under the provision for service of the notice, by delivering or leaving it at the last place of abode of the person entitled to service, it is sufficient to fix it to the door of the house which answers that description (*r*).

Mode of
serving
notice.

956. The object of the notice is to guard the rights of the mortgagor, and if this object be substantially attained the court will not, as against a *bonâ fide* purchaser, minutely criticise the exact terms of the notice. Therefore a sale, not made till the expiration of the proper interval after the service or delivery of the notice, has been held good, though the notice declared the intention to sell when that interval had elapsed *from its date* (*s*); and an agreement for sale may be made before the expiration of the notice, if the agreement be conditional upon non-redemption in the meantime (*t*).

If object of
notice other-
wise attained
its irregu-
larity may be
disregarded.

If the notice be not given, yet if the joinder of the subsequent incumbrancers (if any), and the mortgagor, can be obtained, the sale will be forced on the purchaser (*u*).

957. By s. 67 of the Act of 1881, the notice must be in writing; and it will be sufficient, although only addressed to the mortgagor by that designation without his name; or generally to the persons interested, *without any name*; and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained. It will be sufficiently served if left at the last known

Notice
required
before
exercise of
statutory
power.

(*l*) *Prichard v. Wilson*, 10 Jur. (N.S.) 330; but *quære* see *Selwyn v. Garfit*, *supra*.

(*m*) *Anon.*, 6 Mad. 10.

(*n*) *Gill v. Newton*, 14 W. R. 490.

(*o*) *Hoole v. Smith*, 17 Ch. D. 434.

(*p*) *Parkinson v. Hanbury*, 1 Dr. & Sm. 143, on appeal 2 De G. J. & S. 450; followed *Selwyn v. Garfit*, *supra*.

(*q*) *Tracy v. Lawrence*, 2 Drew 403. A notice of dissolution of partnership properly given under the articles is good, though the partner served be insane. (*Robertson v. Lockie*, 15 L. J. Ch. 379.)

(*r*) *Major v. Ward*, 5 Hare, 598.

(*s*) *Metters v. Brown*, 9 Jur. (N.S.) 958.

(*t*) *Major v. Ward*, *supra*.

(*u*) *Re Thompson & Holt*, 44 Ch. D. 492; considering *Selwyn v. Garfit*, 38 Ch. D. 273.

Paragraphs
957—959

place of abode or business in the United Kingdom of the person to be served, or, in the case of a mortgagor, is affixed or left for him on the land or any house or building comprised in the mortgage; or if sent by post in a registered letter addressed to the person to be served *by name* at the aforesaid place of abode or business, office or counting-house; and if that letter is not returned through the post-office undelivered; and service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

The provisions of this section are cumbrous and inartistic. The objects to be attained are that the mortgagor, if possible, shall have notice, but that the mortgagee shall not be hindered in exercising his power by circumstances for which he is not responsible.

These objects would have been secured by directing that notice in writing sent by registered letter to the mortgagor or person, if any, entitled to redeem, at his last known place of abode or business in the United Kingdom, or fixed on some part of the mortgaged property if it be of an immovable character, should be good service, notwithstanding the absence or disability of the person entitled, and that the non-existence of any person who, if in existence, would be entitled to redeem, shall be no objection to the exercise of the power. The provision that the notice shall be good, notwithstanding that any person to be affected by it is unborn, is a solecism which should not have been allowed to appear even in an Act of Parliament.

Mortgagee
may convey
property
for such
estate and
interest as is
the subject of
the mortgage.

958. The 21st section empowers the mortgagee by deed to convey the property sold, for *such estate and interest therein as is the subject of the mortgage (x)*, free from all estates, interests, and rights which are subject, and subject to all such as are prior to the mortgage; but in the case of copyhold or customary land, the legal rights to admittance shall not pass by such a deed unless the deed is sufficient otherwise by law, or is sufficient by custom in that behalf.

Does not
provide for
outstanding
nominal
reversion in
mortgages by
sub-demise.

959. The power given by the Act of 1881 does not contain a clause commonly used in express powers, where the security is made upon leaseholds, by way of underlease, providing that the mortgagor or his representatives shall stand possessed of the outstanding reversion upon trust for the purchaser. This entitles the purchaser to a conveyance from the trustee (y), or to a vesting order.

It is considered that this clause may still be usefully inserted, although the modification of the law of forfeiture effected by the 14th section of the Act (47), having made the position of such

(x) Herein differing from the previous Act, 23 & 24 Vict. c. 145, which empowered the mortgagee to sell the whole estate and interest of the *creator of the mortgage*. See *infra* (975).

(y) *Hampshire v. Bradley*, 2 Coll. C. C. 34.

a mortgagee less dangerous than it was, it would not in most cases be worth while for the purchaser to get in the reversion at the expense of being liable to indemnify the mortgagor against the rent and covenants of the lease.

Paragraphs
959—962

960. A covenant by the mortgagor that he will join in the sale is for the benefit of the mortgagee only, and not of the purchaser, who is not entitled to claim such concurrence by virtue of the covenant (z). Effect of covenant by mortgagor to join in sale.

961. The 21st section further provides (2) that where a conveyance is made in professed exercise of the statutory power, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised. But any person damnified by an improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power. Title of purchaser under Conveyancing Act, 1881, not to be impeached for irregularity.

This section does not provide, as was usual and considered to be proper in express powers of sale, that a purchaser shall not be affected by express knowledge that the notice required by the power has not been given (**1065**); it having been held that he is not protected against actual knowledge by a mere provision that he shall not be bound to ascertain or inquire into the existence of notice (a). Moreover, if the time for exercising the power has not arrived, the purchaser is not entitled to assume (under such a clause) that the mortgagor has waived the due notice; at all events, not if there are *puisne* incumbrancers (b). And in the absence of this clause a purchaser was not held to his contract for a simple title under the power of sale where no notice had been given, and the mortgagor had assigned his interest, though both he and his assignees were ready to ratify the sale (c).

962. Unless excused by the terms of the power, or of the conditions of sale, the mortgagee is bound to obtain for the purchaser proper evidence of the facts which entitle him to exercise the power. His unsupported statutory declaration, being the evidence of an interested person, will not be sufficient for the purpose (d). Purchaser entitled to know terms of power of sale.

Under a provision agreeing in substance with the above clause for the protection of the purchaser, and giving the mortgagor a remedy in damages only, it was held that a sale to a *bonâ fide*

(z) *Corder v. Morgan*, 18 Ves. 344.

(a) *Parkinson v. Hanbury*, 1 Dr. & Sm. 143, on appeal 2 De G. J. & S. 450; *Selwyn v. Garfit*, 38 Ch. D. 273; *Bailey v. Barnes*, [1894] 1 Ch. 25. In *Ford v. Heely* (3 Jur. (n.s.) 1116), the mortgagor, after conveying to trustees for his creditors, had given the mortgagee an authority to sell, and had agreed to waive notice and to convey, which he afterwards refused to do; an objection that his concurrence was unnecessary was held not sustainable.

(b) *Selwyn v. Garfit*, *supra*.

(c) *Foster v. Hoggart*, 15 Q. B. 155.

(d) *Hobson v. Bell*, 2 Beav. 17; *Edwards and Rudkin to Green*, 58 L. T. 789.

Paragraphs
962—963

purchaser without notice would be good, though the security had been satisfied (e). But, nevertheless, a purchaser is not bound to rely on the provision, but may if he pleases demand evidence (f). The mere fact that a purchase from the mortgagee's assign took place the day after the transfer of the mortgage, and for the exact amount of principal and interest, does not put a subsequent purchaser from such purchaser upon inquiry as to the *bona fides* of the original sale nor affect his title, although such original sale was in point of fact *mala fide* (g).

Mortgagee
holds balance
of purchase
moneys in
trust for
mortgagor.

963. The 21st section of the statute also provides (3) that the money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under the Act of a sum to meet any prior incumbrance, shall be held by him *in trust*, to be applied by him first in payment of all costs, charges and expenses properly incurred by him, as incident to the sale, or any attempted sale or otherwise; and secondly, in discharge of the mortgage money, interest and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

Where the clause merely declares that the mortgagee shall apply the purchase-money and surplus as above stated, or where (as in the power of sale in the Merchant Shipping Act, 1894) there is no special provision as to the disposal of the purchase-money, it is said (h) that the mortgagee becomes a constructive trustee of the surplus only, when and not before it is shown that there was a surplus; and the mortgagor will not be allowed after six years to produce evidence of the existence of a surplus for the purpose of raising a trust.

And even where, as is sometimes the case (i), the deed, in the words of the Act, expressly declares that the mortgagee shall hold the proceeds of sale *upon trust*, the express trust applies only to the surplus, and cannot be enforced by the mortgagor for any other purpose (k). So far as regards the surplus, however, the trust is an express one, so as to exclude the Statute of Limitations except under the Trustee Act, 1888. It also affects the solicitor of the mortgagee who holds the surplus with notice of the trust (l).

(e) *Dicker v. Angerstein*, 3 Ch. D. 600.

(f) *Life Interest, etc., Corporation v. Hand-in-Hand Fire & Life Insurance Society*, [1898] 2 Ch. 230.

(g) *Bailey v. Barnes*, [1894] 1 Ch. 25.

(h) *Banner v. Berridge*, 18 Ch. D. 254; *per* KAY, J. See *Warner v. Jacob*, 20 Ch. D. 220.

(i) *Gouthwaite v. Rippon*, 8 L. J. (N.S.) Ch. 139.

(k) *Banner v. Berridge*, 18 Ch. D. 254.

(l) *Re Bell, Lake v. Bell*, 34 Ch. D. 462, but see now since Act of 1888, *Thorne v. Heard*, [1895] A. C. 495.

Where the mortgagee showed an intention to give some claimants of the surplus an undue advantage, the money was ordered to be paid into court, and a receiver was appointed of the proceeds of the unsold property (*m*).

Paragraphs
963—965

964. If the surplus remain unproductive in the hands of the selling mortgagee, in consequence of notice from persons interested not to part with it pending disputes as to the title, he is not chargeable with interest (*n*).

Interest on
surplus
purchase-
moneys.

965. In express powers, the direction as to the disposal of the surplus purchase-money of mortgaged real estate after the death of the mortgagor, is variously framed. Sometimes it requires payment to the executors or administrators of the mortgagor; a form which is open to the objection (*o*) that it is not the office of the mortgagee to change the equities of the persons entitled subject to the mortgage, *i.e.*, to effect a conversion beyond what is necessary for realizing the mortgage debt. And the general rule has been long since adopted, that although the surplus will belong to the personal estate of the mortgagor if the sale took place during his life (*p*), it will, notwithstanding such a direction, pass as part of his real estate if the sale were made after his death; because, as the land was unconverted at his death, the money will follow it (*q*). This rule, however, may be modified by circumstances; and where the mortgage was made under a power in a settlement, to the uses of which the equity of redemption was limited, but the surplus on a sale by the mortgagee was made payable to the husband, his heirs, executors, administrators or assigns, it was held to belong to his administrator, though the sale was made after the husband's death: because he had no interest in the equity of redemption, and the trust in his favour did not arise till after conversion (*r*).

Disposal of
surplus
purchase-
money after
death of
mortgagor.

The heirs and assigns are sometimes pointed out by the power as the recipients (*s*): but if the mortgagor by his will should effect an absolute conversion of his real estate, this form will be no more

(*m*) *Gouthwaite v. Rippon*, *supra*.

(*n*) *Mathison v. Clarke*, 25 L. J. Ch. 29. The Building Societies Act, 1874 (c. 42), s. 30, provides that when a member of the society, having executed a mortgage to the society, shall die intestate, leaving an infant heir or *co-heiress*, the society, after selling the mortgaged premises, may pay to the administrator or administratrix of the deceased member any sum to the amount of 150*l.* out of the surplus, without paying it into a post office savings bank, under 30 & 31 Vict. c. 142, s. 24, now 51 & 52 Vict. c. 43, s. 70.

(*o*) See Davidson's Conv. vol. 2, p. 629, ed. 3, p. 83, ed. 4.

(*p*) *Re Grange*, *Chadwick v. Grange*, [1907] 2 Ch. 20.

(*q*) *Wright v. Rose*, 2 Sim. & St. 323; *Bourne v. Bourne*, 2 Hare, 35; *Re Smith*, 7 Jur. (N.S.) 903. But in the latter case, on the death of the heir or devisee, it will pass to his personal representative, who may recover it from the mortgagee as money had and received. (*Hardy v. Felton*, 14 L. T. (O.S.) 346.) See *Re Underwood*, 3 K. & J. 745; *Locking v. Parker*, L. R. 8 Ch. 30.

(*r*) *Jones v. Davies*, 8 Ch. D. 205.

(*s*) See Davidson's Conv., vol. 2, p. 629, ed. 3, p. 83, ed. 4.

Paragraphs
965—968

correct than the other ; for the decisions show that the money is ultimately bound by the actual equities, notwithstanding the terms of the deed. A third form of declaration, following the principle of the general decisions, gives the surplus to the executors, administrators or assigns of the mortgagor, if the sale shall take place during his life, but to his heirs or assigns if it shall happen after his death ; but this also may be rendered nugatory by the will of the mortgagor. Lastly, the surplus may be directed to be paid to the mortgagor, his heirs, executors, administrators or assigns, according to their respective rights and interests therein. This also has been objected to because it throws upon the mortgagee the responsibility of judging who is the person entitled. But that is done by the law, not by the deed. This form, which was adopted by the legislature in the now repealed statutory power, which will presently be mentioned, does not attempt to lay down any direction which circumstances may render abortive. And the language is more accurate than that of the statute of 1881, which gives the residue to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof : the person entitled to the property at the time of division of the surplus being in strictness the purchaser, and the person authorized to give receipts for the proceeds of the sale, being the mortgagee who exercises the power.

Statutory
provision may
be varied by
deed.

966. The above statutory powers and provisions relating to and regulating the exercise of the power, may be varied or extended by the mortgage deed ; and, as so varied or extended, shall, so far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in the Act (*t*).

Rights to
foreclose.

967. The power of sale shall not affect the right of foreclosure (*u*) ; a provision which is in accordance with the law affecting express powers of sale (*x*). On the other hand, after a *decree nisi* for foreclosure the mortgagee pending a decree absolute can only exercise the power of sale with the consent of the court (*y*).

Mortgagee
not answer-
able for
involuntary
loss.

968. The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power, or of any trust connected therewith (*z*).

(*t*) Conveyancing Act, 1881, c. 41, s. 19 (2).

(*u*) Section 21 (5).

(*x*) *Perry v. Keane*, 6 L. J. (N.S.) Ch. 67. See *Slade v. Rigg*, 3 Hare, 35 ; *Wayne v. Hamham*, 9 Hare, 62.

(*y*) *Stevens v. Theatres, Limited*, [1903] 1 Ch. 857.

(*z*) Section 21 (6).

969. At any time after the power had become exercisable, the person entitled to exercise it may demand and recover from any person (other than a person having in the mortgaged property an estate, interest or right in priority to the mortgage), all the deeds and documents relating to the property or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him (a).

Paragraphs
969—973

Persons to
exercise
power
entitled to
same title
deeds as a
purchaser.

970. The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power or for any money or securities comprised in his mortgage or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage (b). This provision, however, does not enable the mortgagee of a chose in action to require the trustee to hand over to him the entire chose (c) (**165, 914**).

Mortgagee's
receipt
sufficient
discharge.

971. Money received by a mortgagee under his mortgage or from the proceeds of securities comprised therein, shall be applied in like manner as is directed by the Act respecting money arising from a sale under the statutory power; but the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money instead of those incident to sale (d).

Money
received
under
mortgage to
be applied as
proceeds of
sale.

972. The Act repeals that part of 23 & 24 Vict. c. 145 which conferred the former statutory powers of sale; providing, however, that the repeal shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of any thing done or suffered before the commencement of the Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal (e).

Lord
Cranworth's
Act (23 & 24
Vict. c. 145)
repealed.

It has been suggested that the last clause does not sufficiently provide for the cases in which powers of sale and other mortgagee's powers have been omitted from securities, in reliance upon the repealed clauses of the Act of 23 & 24 Vict. c. 145 (f). It has, however, been held that they are saved by the words "operation, effect, or consequence of any instrument executed or made before the commencement" of the repealing Act (g).

973. The repealed Act (23 & 24 Vict. c. 145), (to which it will still be necessary to refer in the case of securities not containing

Summary of
power
conferred

(a) Section 21 (7).

(b) Section 22 (1).

(c) *Hockey v. Western*, [1898] 1 Ch. 350.

(d) Section 22 (2).

(e) Section 71. The rest of the Act has since been repealed by the Settled Land Act, 1882.

(f) See Clerke and Brett on the Act of 1881, notes on ss. 19 and 71.

(g) *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.

Paragraphs
973

by Lord
Cranworth's
Act, which
still applies
to securities
made before
1882.

express powers of sale, and which were made before the time of operation of the Act of 1881, viz. January 1st, 1882), provides (*h*) that where any principal money is secured or charged by deed on any hereditaments of any tenure (*i*), or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns, shall at any time after the expiration of one year from the time when such principal money shall have become payable according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance, which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have, amongst other powers (operating to the same extent as if they had been in terms conferred by the person creating the charge), a power to sell or concur with any other person in selling the whole or part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time in like manner.

Receipts for purchase-money given by the person or persons exercising the power of sale given by the Act, shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money (*k*).

No such sale shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers, the title of the purchaser shall not be liable to be impeached on the ground that no case has arisen to authorize the exercise of such power, or that no such notice as aforesaid has been given; but any person damnified by an unauthorized exercise of such power shall have his remedy in damages against the person selling (*l*).

The money arising from any sale effected as aforesaid shall be applied by the person receiving the same as follows: first, in payment of all the expenses incident to the sale or incurred in any attempted sale: secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal moneys then due in respect of such charge: and the residue of such money shall be paid to the person entitled to the property subject to the charge,

(*h*) Sections 11 to 16.

(*i*) The Act therefore does not apply to hereditaments which are not subjects of tenure, such as personal annuities descending to the heir. See *Exp. Wynch*, 5 De G. M. & G. 188.

(*k*) 23 & 24 Vict. c. 145, s. 12.

(*l*) Section 13.

his heirs, executors, administrators, or assigns, as the case may be (*m*) (1319). *Paragraphs*
973—975

The person exercising the power of sale shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person creating the charge had power to dispose of ; except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed (*n*).

At any time after the power of sale shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered, or assigned to and were then vested in him, for all the estate and interest which the person creating the charge had power to dispose of. And where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made (*o*).

974. This statute applies only to such instruments as were executed after it was passed (August 28th, 1860) (*p*) ; and such of its provisions as affect the powers of mortgagees, apply only to mortgages and charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt (*q*) (1320). 23 & 24 Vict.
c. 145 does
not apply to
instruments
made before
August 28th,
1860.

975. The powers given by this Act, though valuable where the power of sale has been omitted from the security, were in several respects less convenient than the powers of the Act of 1881, or express powers properly framed. If, as is usual, the interest on the mortgage be payable half-yearly, it seems that the repealed statutory power cannot be exercised till at least eighteen months have expired from the date of the security. The interest must have been in arrear for six months, and six months' notice must have been given ; and in the absence of a provision that the notice may be given before the interest has actually fallen into arrear for six months, an exercise of the power depending upon such a notice could hardly be considered safe. Comparison
of the powers
conferred
by Lord
Cranworth's
Act and
Conveyancing
Act.

Again, the purchaser's title is protected only where no case has arisen to authorize the exercise of the power, and where no notice

(*m*) Section 14.(*n*) Section 15.(*o*) Section 16.(*p*) Section 34.(*q*) Section 24.

Paragraphs
975—977

has been given. The Act is silent as to an improper exercise of the power after it has arisen, and which is irregular otherwise than by the absence of notice; nor does it protect the purchaser where he is aware of the absence of notice, or of other irregularities; and it gives the person damnified an express remedy in damages only where the exercise of the power was unauthorized: but none where, being authorized, it was improperly exercised either for want of notice or otherwise.

Lord Cranworth's Act also vests the property sold in the purchaser, for all the estate and interest therein *which the creator of the charge had power to dispose of*; so that it enabled (and still enables where it applies (*r*)) an equitable mortgagee to convey the legal estate, or a mortgagee of an underlease to sell the whole of the original term (*s*); and it follows that a mortgagee for a term of years might sell the fee; a right which he could only acquire by consent in a sale in equity, where if the whole estate be sold the mortgagor is entitled to the difference in value between the term and the fee (*t*). It might also enable a mortgagee of part of an estate to vest in a purchaser a right to hold the title deeds, which he himself could not claim under his contract (*u*) (685). The power of sale substituted for this power by the Conveyancing and Law of Property Act, 1881, does not continue these abnormal powers of passing the mortgagor's entire estate and interest; so that under equitable mortgages made since 1881, the equitable mortgagee cannot sell and convey the legal estate in fee (*x*).

Effect of
power
contained in
schedule to
25 & 26 Vict.
c. 53.

976. The power of sale contained in the form of mortgage given in the schedule to the "Act to facilitate the proof of title to, and the conveyance of real estates" (*y*), was intended, it is presumed, to operate under 23 & 24 Vict. c. 145.

Purchaser
may be
registered
as first
proprietor
under Land
Transfer Acts
1875 & 1897.

977. In the case of a charge registered under the Land Transfer Acts, 1875 and 1897, subject to any entry to the contrary on the register, the registered proprietor of a registered charge has now the right to exercise the powers of sale conferred on mortgagees by the Conveyancing Act, 1881 (*z*). Under the first of these Acts, the registered proprietor of a registered charge *with a power of sale*

(*r*) *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.

(*s*) *Hiatt v. Hillman*, 19 W. R. 694.

(*t*) See *Foster v. Eddy*, 13 Jur. 761; *Cutfield v. Richards*, 26 Beav. 241.

(*u*) It is understood that the unfortunate wording of this clause arose (as too often happens) from the insertion in the Act of the original suggestions for the clause without submitting them to the draftsman for proper revision. The intention was to prevent a purchaser from getting a good statutory title where the mortgagor's title was defective.

(*x*) *Re Hodson and Howe's Contract*, 35 Ch. D. 668.

(*y*) 25 & 26 Vict. c. 53. "C. D. shall have power to sell on default of payment of the principal or interest, or any part thereof respectively."

(*z*) 60 & 61 Vict. c. 65, s. 9 (2). The sub-section seems to be unnecessary in the case of charges made by deed; the present rules provide that all charges shall be so made.

might after the expiration of the appointed time sell and transfer the land charged or any part thereof as if he were the registered proprietor thereof (*a*). Whether, however, a sale be made under the statutory or under an express power, any mortgagee or other person having a power of selling land, may authorize the purchaser to apply to be registered as first proprietor, with any title which a proprietor is authorized to be registered with under the Act, and may consent to the performance of the contract being conditional on his being so registered; or may himself apply to be registered as such proprietor, with the consent of the persons, if any, whose consent is required to the exercise by the applicant of his power of sale: and the amount of all costs, charges, and expenses properly incurred by such person, in and about such application, shall in all cases be ascertained and declared by the registrar, and shall be deemed to be costs, charges, and expenses properly incurred by such person in pursuance of his power; and such person may retain or reimburse the same to himself out of any money coming to him under the power, and he shall not be liable to any account in equity in respect thereof (*b*).

Paragraphs
977—979

978. The Merchant Shipping Act, 1894, empowers every registered mortgagee absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money. But if there be more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee (*c*). The Act, as has already been noticed (**963**), contains no direction as to the disposal of the purchase-money.

First mortgagee of ship has absolute power of sale.

979. The pawnbroker's right of sale is also declared by statute, which provides for its exercise by public auction under certain regulations, at the expiration of a year and seven days after the day of pledging, although the right of redemption when the pledge is pawned for more than ten shillings continues until sale. The pawnbroker himself may purchase, and on purchasing becomes absolute owner of the pledge.

Pawnbroker must sell by auction, but may himself purchase.

At any time within three years after the auction at which a pledge pawned for above ten shillings is sold, the holder of the pawn ticket may inspect the entry of the sale in the pawnbroker's book, and in the filled-up catalogue of the auction (authenticated by the signature of the auctioneer), or in either of them. Where the entry shows that the sale produced more than the loan and profit then due, the pawnbroker, on demand within three years, is bound

(*a*) 38 & 39 Vict. c. 87, s. 27.

(*b*) *Id.* s. 68.

(*c*) 57 & 58 Vict. c. 60, s. 35.

Paragraph
979

to pay the surplus, after deducting the necessary costs and charges of the sale, to the holder of the pawn ticket. But if within twelve months before or after that sale, the sale of another pledge or other pledges of the same person has resulted in a deficit, the pawnbroker may set-off the deficit against the surplus, and shall be liable to pay the balance only after such set-off. For every breach by the pawnbroker of these provisions, he is liable to a penalty not exceeding ten pounds (*d*).

Upon the sale of a forfeited pledge, the pawnbroker only undertakes that it is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it (*e*).

(*d*) The Pawnbrokers Act, 1872, c. 93, ss. 19—23, and 5th Schedule; and see ss. 32 (8), 45. Here the Legislature has affirmed the principle of consolidation, which in mortgages it seeks to abolish (1211).

(*e*) *Morley v. Attenborough*, 13 Jur. 282.

CANADIAN NOTES

SALE UNDER POWER OF SALE

THE form of mortgage provided by the Act respecting Short Forms of Mortgages (*a*), includes a power of sale; and by the Act respecting Mortgages of Real Estate (*b*) an implied power of sale is given to mortgagees. As to exercise of power of sale by reason of interest overdue, and action to restrain proceedings, see *Martin v. Hopkins* (1909), 13 O. W. R. 965. In the case of *Re Muffitt v. Mulvihill* (1906), 8 O. W. R. 347, it was held that omission to serve notice of sale on the mortgagor and his wife was not an objection to the vendor's title, the mortgagor having sold the equity of redemption. The power of sale is usually created by conveying the lands to the mortgagee in fee, with a proviso for redemption, and with a further proviso that, if default be made in payment, it shall be lawful for the mortgagee, his heirs, executors, administrators and assigns, after giving notice, to enter on and lease or sell the lands: see the form provided by the Act respecting Short Forms of Mortgages (*c*). Where a mortgage is under the Land Titles Act, R. S. O. (1897), c. 138, the exercise of the power of sale is regulated by s. 38 of that Act. In the case of a mortgage of lands in Saskatchewan see the Real Property Act, Statutes of Alberta, 1906, c. 24, and the Real Property Act (Manitoba) R. S. M. (1902), c. 148. The mortgagee's right to sell is governed by the Land Titles Act (1906), 6 Edw. VII. c. 24, and 8 & 9 Edw. VII. c. 9, s. 103.

The notice of intention to exercise power of sale is a sufficient demand for payment, *Re Sovereign Bank and Keilty* (1910), 16 O. W. R. 73.

(*a*) R. S. O. (1897), c. 126, Schedule B.

(*b*) R. S. O. (1897), c. 121, s. 18.

(*c*) R. S. O. (1897), c. 126, Schedule B, clause 14.

Section 2 of Schedule B of the Ontario Act, R. S. O. (1897), ch. 126, provides that the parties may introduce into or annex to any of the abbreviated forms any express exceptions from, or other express qualifications thereof; and the like exceptions and qualifications shall be taken to be made from or in the corresponding extended forms. But to obtain the benefit of the extended forms in Column Two, it is necessary to use the abbreviated forms of words in Column One corresponding thereto. The extended form of the power of sale in the Short Forms Act (*d*) provides that the power may be exercised by the assignees of the mortgagee; but if the extended form is not available, the power is personal to the mortgagee, and does not pass to his assignee. For while the assignment of the mortgage conveys the land and transfers the mortgage debt, the assignee cannot exercise the power of sale, unless it is expressly reserved to him (*e*). In *Re Gilchrist and Island* (*f*) the power of sale was in the following words: "Provided that the said mortgagee, on default of payment for two months, may without giving any notice, enter on and lease or sell the said lands;" and it was held that this was neither an exception from or a qualification of the form provided by the statute, but an abolition of one of its most important forms; that is, that written notice should be given to the mortgagor. The power, therefore, was personal to the mortgagee, and could not be exercised by his assigns. In *Re Green and Atkins* (*g*) the power of sale was in these words: "Provided that the said mortgagee on default of payment for one month, may on giving notice in writing, enter on and lease or sell the said lands." Ferguson, J., held that the substitution of the word "month" for "months" was not a material variation, and that the assignee of the mortgage could exercise the power of sale. Where the proviso was that the mortgagee, on default of payment for one day, might without any notice enter on and lease or sell the lands, the Court was divided in opinion as to its effect,

(*d*) Schedule B, clause 14.

(*e*) *Emmett v. Quinn* (1882), 7 Ont. App. 306; *Re Gilchrist and Island* (1886), 11 Ont. 537.

(*f*) (1886), 11 Ont. 537.

(*g*) (1887), 14 Ont. 697.

Rose, J., being of opinion that the power was operative under the Short Forms Act, while Street, J., held that the form used was not operative, and that the words therefore must be confined to their actual meaning apart from the statute (*h*). In *Barry v. Anderson* (*i*) the words used were as follows: "Provided that the said mortgagees on default of payment for one month may, on ten days' notice enter on and lease or sell the lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due the said power of sale and entry may be acted upon without any notice;" and it was held that this form was within the Act, and that the power of sale could be exercised by the assignees of the mortgagee. In consequence of the decision in *Re Gilchrist and Ireland* (*k*), the following was enacted by the Ontario Legislature: (1) Whenever a mortgage purporting to be made in pursuance of the Act respecting Short Forms of Mortgages contains a power of sale which provides for a sale without notice, the mortgagee, his heirs, executors, administrators or assigns may take proceedings to sell under and sell and have the benefit of the provisions of Part II. of this Act as fully and effectually as if the mortgage had not contained a power of sale. This sub-s. shall be held to apply to all mortgages, whether heretofore or hereafter made (*l*). The time within which a sale might be questioned, if made by the assignee of a mortgage under the power of sale, is limited to two years in the Act respecting Mortgages of Real Estate (*m*). Where a mortgage is made in pursuance of the Short Forms Act and contains a power of sale, the person exercising the power may avail himself of the provisions of the Act respecting Mortgages of Real Estate (*n*) in either of the following cases: (1) Where the power of sale is in conformity with the Short Forms Act, the mortgagee, his executors, administrators or assigns may on four months' default and two months' notice, unless the terms of the power fix longer periods, take the proceedings prescribed by the Act respecting Mortgages

(*h*) *Clark v. Harvey* (1888), 16 Ont. 159. (*l*) R. S. O. (1897), c. 121, s. 29 (2).

(*i*) (1891), 18 Ont. App. 247. (*m*) R. S. O. (1897), c. 121, s. 34.

(*k*) (1886), 11 Ont. 537. (*n*) R. S. O. (1897), c. 121.

of Real Estate in lieu of the proceedings provided by the Short Forms Act. (2) Where the power of sale is not in conformity with the Short Forms Act by reason of its providing for sale without notice, the mortgagee, his heirs, executors, administrators or assigns may take the proceedings provided by the Act respecting Mortgages of Real Estate. In a mortgage which was intended to be taken in the name of the mortgagee, Mary Jane Burton, she, by mistake, was described as Clara Benton, that being a name she had never assumed or been known by. It was held that the legal estate did not pass to her by the mortgage, whatever its operation in equity; and that she could not make a good legal title to a purchaser under the power of sale in the mortgage (*o*).

The insertion of the word "calendar" before the word "month" in the words given in column 1, No. 13 of the second schedule of the Short Forms Act (R. S. M., 1902, c. 157), does not prevent the mortgagee getting the benefit of the wording of the corresponding long form, and where the words of the short form above referred to were followed by the words "should default be made for two months a sale or lease may be made hereunder without notice." Held, that these words were effectual to enable the mortgagee to make a valid sale and conveyance of the whole estate mortgaged without giving any notice whatever of his intention to do so (*p*).

A power of sale may provide for its exercise without notice; and such a power is as valid as one which requires notice to be given (*q*).

The question upon whom the notice is to be served is to be determined according to the circumstances existing at the time notice is given (*r*).

The power in the Short Forms Act was reserved to the mortgagee, his heirs, his executors, administrators or assigns (*s*).

(*o*) *Burton v. Dougall* (1899), 30 Ont. 543.

(*p*) *In re Cotter*, 23 Occ. N. 289; 14 Man. L. R. 485.

(*q*) *Re British Canadian Loan and Investment Company and Roy* (1888), 16 Ont. 15.

(*r*) *Martin v. Merritt*, 3 O. L. A. 284; *Re Abbott and Metcalf*, 20 O. R. 299; *Re Muffit and Mulvihill*, 8 O. W. R. 347.

(*s*) R. S. O. (1897), c. 126; Schedule B, clause 14.

This change was properly made as the personal representatives of the mortgagee are the proper persons to receive the money and to assign or discharge the mortgage debt (*t*). Where a mortgage made in favour of two trustees of a marriage settlement, contained a power of sale exercisable by them, but not by an assignee of the mortgage, which was not in conformity with the Short Forms Act, and the mortgage was on the resignation of the trustees assigned to a new trustee appointed in their place, it was held that the new trustee stood in the place of the former trustees and could exercise the power of sale, not as assignee of estate, but as if appointed a trustee by the deed creating the trust (*u*). Where after 1st July (1886) a mortgage is made to more persons than one jointly and not in shares, the mortgage money shall be deemed to be money belonging to the mortgagees on a joint account unless a contrary intention is expressed in the mortgage (*x*), and the survivor or survivors of the mortgagees may exercise the power of sale. By s. 26 of the Act respecting Mortgages of Real Estate (*y*), the person exercising the power of sale thereby conferred is empowered to convey the property to a purchaser for all the estate and interest therein which the person who created the charge had power to dispose of. Where a mortgagee is a lunatic the provisions of the Act respecting lunatics are sufficiently wide to authorize an application by the committee to the court for leave to sell under the power of sale (*z*). In *Lewin v. Wilson* (1882), 11 A. C. 639, and 9 S. C. R. 637; *Trueman's New Brunswick Equity Case and Trust and Loan Company v. Stephenson* (*a*) it was pointed out that s. 23 of the Real Property Limitation Act, R. S. O. (1897), c. 133, does not apply to an action for foreclosure, which is an action for the recovery of land, and not for the recovery of money charged upon land, and that the section of the New Brunswick Limitation Act, C. S. N. B., c. 84, which was applicable in *Lewin v. Wilson*, was the one which

(*t*) R. S. O. (1897), c. 121, s. 11.

(*u*) *Re Gilmour and White* (1887), 14 Ont. 694.

(*x*) R. S. O. (1897), c. 121, s. 13.

(*y*) R. S. O. (1897), c. 121.

(*z*) R. S. O. (1897), c. 65.

(*a*) (1892), 20 Ont. App. 66.

corresponds with our s. 22, and not the one which corresponds to our s. 23. In the *Law Quarterly Review*, vol. 7, p. 63, Mr. Thomas Millidge contributes a learned article questioning the soundness of the decision of the Judicial Committee, and that it was in conflict with the decision of the Court of Appeal in *Newbould v. Smith*, 33 Ch. D. 127. Section 23 enacts that "no action or other proceeding shall be brought," and it appears clear that its provisions extend not only to an action for sale but also to proceeding under the power of sale, and see *Neil v. Almond* (b). Where the mortgage provided that the mortgagees on default of payment for three months could sell without notice but that the mortgagors should have one month's notice of sale it was held that notice of sale may be concurrent with default, but that the mortgagees were not bound to wait until default had been made for three months before serving the notice (c). Where the notice is served under the Act respecting Mortgages of Real Estate it may be given at any time after default in payment (d). The intention to sell should be distinctly stated in the notice and the mode of giving a notice prescribed by the power of sale which should be strictly observed, *Bartlett v. Jull* (e). The power of sale in the Short Forms Act provides for sale after giving notice to the mortgagor, his heirs, or assignees (f). Where the wife of the mortgagor joins in the mortgage for the purpose of barring her dower she has such an interest in the proceeds of the sale as to entitle her to notice of intention to sell, Dower Act (g). The Devolution of Estates Act (h) provides that where the real estate of a deceased person vests in the personal representatives under the Act, such personal representatives while the real estate remains in them shall be deemed to be the heirs, s. 10. The Real Estate remains vested in the personal representatives for twelve

(b) (1897), 29 O. R. 63.

(c) *Grant v. Canada Life Assurance Co.* (1881), 29 Gr. 256. But see *Gibbons v. McDougall* (1879), 26 Gr. 214.

(d) R. S. O. (1897), c. 121, s. 20 (1).

(e) (1880), 28 Gr. 140.

(f) R. S. O. (1897), c. 126, Schedule B, clause 14.

(g) R. S. O. (1897), c. 164, ss. 7 & 8.

(h) R. S. O. (1897), c. 127.

months after the death of the testator or intestate or the registration of a caution. After the expiration of that time the real estate will become vested in the heirs or devisees of the mortgagor, s. 13, and see the Manitoba Devolution of Estates Act (i). The purchaser of the equity of redemption is entitled to notice (k). The plaintiff entered into an agreement in writing with the second mortgagee and the mortgagor, whereby he was entitled to enforce a transfer of their interest to him. The first mortgagee with express notice of this agreement sold without notice to the plaintiff. Held, that the plaintiff was entitled to notice and the sale was set aside. If the owner of lands makes a lease and subsequently mortgages, the mortgagee is in the position of assignee of the reversion on the lease and takes the land subject to the lease. If the mortgagor after making the mortgage leases the lands, the lessee is a purchaser of the equity of redemption *pro tanto* and is entitled to redeem, and is entitled to notice of sale (l).

In an action by the purchaser of the equity of redemption in mortgaged premises to redeem the same upon the ground, *inter alia*, that no proper or sufficient notice of exercising power of sale having been served upon him, it was held, per Irving and Clement, JJ., that it was no objection to the validity of such notice that it was expressed to be a notice by the agent of the mortgagee, or that it was unsigned, it having been mailed to the plaintiff accompanied by a letter signed by the agent in his own name; nor was such notice conditioned by reason of a statement in such letter that if the plaintiff refused to sign a certain document "the only course open to me is to serve you with the enclosed notice of my intention to sell;" nor was it a valid objection to the sufficiency of such notice that the unsigned document stated that such sale would be after the expiration of one calendar month, while the signed letter

(i) R. S. M. (1902), c. 48.

(k) *Buckley v. Wilson* (1861), 8 Gr. 566; *Stewart v. Rowsam* (1892), 22 O. R. 533.

(l) *Anderson v. Stevenson* (1888), 15 O. R. 563; *Martin v. Miles* (1883), 5 O. R. 404; *Collins v. Cunningham*, *Cunningham v. Drysdale* (1892), S. C. R. 139; *Dominion Trust Co. v. Bower* (1906), 3 W. L. R. 157; *McKenzie v. McLeod* (1908), 5 E. L. R. 172.

accompanying it informed the plaintiff "I propose to sell as soon as possible;" nor was such notice waived or abandoned by the mortgagee having served a fresh notice of exercising power of sale some two years subsequently (*m*). On the mortgagee paying into Court the whole surplus less the costs of his appearance and application, his name was struck out of the suit (*n*).

Execution creditors of the mortgagor are also entitled to notice (*o*). A surety for part of the mortgage debt is entitled to notice (*p*).

By R. S. O. (1897), c. 126, schedule B. (14) notice is required to be given to the mortgagor, his heirs, or assigns, either personally or at his or their usual or last place of residence, and see *Donohue v. Whitty* (*q*).

Mortgagees of land, the mortgage being in default, made an agreement for sale to C., who paid nothing, but entered into possession and made improvements and in order to do so borrowed money from N. and assigned to N. his agreement from the mortgagees. The agreement and the assignment were registered. The mortgagees found another purchaser and paid N. a sum of money for a release of his claim. Held, that upon an accounting by the mortgagees at the suit of the mortgagors, on the basis of the second sale, the mortgagees were entitled to credit for the money paid to N.

Held also that they were entitled to credit for a small sum paid to their solicitor for negotiating the second sale—a service which comes within the scope of the professional duties and employment of a solicitor (*r*).

A part owner of a farm joined in promissory notes as surety for the purchaser of a machine and also gave a lien on his share of the land as further security. Subsequently his interest passed to his co-owner, of whom the plaintiffs were execution

(*m*) *Lockhart v. Yorkshire Guarantee and Securities Corporation* (1909), 14 B. C. R. 28; *Finkelstein v. Locke* (1907), 6 W. L. R. 173.

(*n*) *Boyne v. Robinson*, 25 Occ. N. 75; 3 N. B. Eq. 57.

(*o*) *Re Abbott and Medcalf* (1891), 20 O. R. 299.

(*p*) *Martin v. Hall* (1878), 25 Gr. 471.

(*q*) (1882), 2 O. R. 424.

(*r*) *Lawes et Rex v. Toronto General Trusts Corporation* (1904), 8 O. L. R. 522.

creditors under judgments subsequent to the lien. The defendants being mortgagees of the whole farm prior to the lien afterwards sold under their power of sale, and out of the proceeds paid off the lien and the notes were assigned in 1894 by them to an execution creditor subsequent to the plaintiffs, who held them till 1898, and then sued on the notes without result as the maker had become insolvent. It was shown that if the maker had been sued in 1895, by which time the notes had become payable, the amount of them would have been recoverable. Held, that the notes were not paid by the application of the proceeds of the sale in discharge of the lien at a time when they had not matured, the payment not having been made by the party primarily liable, the lien being given as a security only, and that the defendants should have secured the notes for the execution creditors generally and were bound to account to the execution creditors for the amount paid in respect of them to the vendors of the machine though under the circumstances without interest (s).

The defendants advertised an auction sale of mortgaged lands situate near Kincardine to take place there on the 19th January. At 11 a.m. on the 17th January the mortgagor telegraphed to the defendants at Toronto to inquire the amount required to redeem it, and the defendants telegraphed a reply. At 10 a.m. on the 19th January the defendants received at Toronto the amount named, but in accordance with their office procedure the accountant was not aware of this until about 11 a.m., when knowing the property was up for sale he telegraphed and telephoned the fact to Kincardine. The sale had, however, been made a few minutes before to the plaintiff. The defendants then returned the money to the mortgagor. Held, that the plaintiff was entitled to specific performance, for the mortgagor had not tendered the amount at such reasonable time before the sale as to make it obligatory on the defendants to receive it in payment (t).

In an action brought by the purchaser on a contract for the

(s) *Glover v. Southern Loan and Savings Company* (1900), 31 O. R. 552.

(t) *Gentles v. Canada Permanent and Western Canada Mortgage Corporation* (1800), 32, O. R. 429; *McKenzie v. McLeod, et al*, ante, p. 502g.

sale and purchase of land, there was a decree for specific performance and a reference as to title, upon which it appeared that the vendor was professing to sell under the power of sale contained in a mortgage. The notice of sale was addressed to the mortgagor then resident abroad, G. A. M. (as his agent), E. M. and W. M., J. M. and J. A., and said "I, C. W., hereby give you notice," etc. It was dated and signed by the solicitor for the mortgagee. Held, that on its face it was a sufficient notice. It was shown that G. A. M. was acting generally as agent of the mortgagor in respect of the mortgaged lands and other matters. The agent accepted service for the mortgagor and forwarded the notice to the mortgagor, who received it in due course. Held, that the service was effective. J. M. and J. A. were subsequent mortgagees, who had assigned their mortgages to G. A. M., who accepted service of the notice for them, saying in his acceptance that he was the assignee of their mortgages. The assignment to him was not registered. Held, that J. M. and J. A. were not entitled to notice.

The notice was not served upon E. M. and W. M., but the evidence showed that their mortgage was paid and satisfied. Held, that they were not entitled to notice. Held, also, that the notice was a good notice to G. A. M. in respect of all claim, which he might have or profess to have in the matter (*u*).

A notice of sale may be registered in the Registry Office (*x*).

From and after the first day of January, 1900, no instrument which purports to be a conveyance of lands after notice and under power of sale contained in a mortgage shall be registered until the notice shall have been registered in the Registry Division in which the lands are situated pursuant to this section (*y*).

This sub-section does not apply to any conveyance of lands purporting to have been made before or in pursuance of any sale effected before the first day of January, 1900 (*z*).

Sections 31 and 32, R. S. O. (1897), c. 121, provides for a

(*u*) *Fenwick v. Whitwam* (1901), 1 O. L. R. 24.

(*x*) R. S. O. (1897), c. 121, ss. 23, 24; R. S. O. (1897), c. 136, s. 72.

(*y*) 62 Vict. ch. 16, s. 6, sub-s. 5.

(*z*) 63 Vict. c. 19, s. 8.

suspension of remedies when demand of payment is made or notice of intention to exercise power of sale is given (*a*). The Act does not apply when the power of sale is exerciseable without any notice (*b*). The power of sale in the Short Forms Act (*c*) provides that the person exercising the power may sell by public auction or private contract, and a sale under the Act respecting Mortgages of Real Estate (*d*) may be by public auction or private contract. The mortgagee must exercise the power *bonâ fide* (*e*).

The mortgagee in a mortgage containing two parcels of land, a farm or buildings, and some village lots with stores thereon, about three quarters of a mile distant from the farm, sold the property *en bloc* under the power of sale in the mortgage for a much smaller sum as shown by the evidence than would have been realized had the properties been sold separately. Held, that the mortgagees had not acted with that prudence and discretion which they were bound to do, and that they were liable to the mortgagors for the amount that might have been realized (*f*).

A mortgagee sold property by auction valued at \$7200 for \$4850. It was held that the sale was not at such a gross under-value as would justify the interference of the Court. The purchaser at the auction had made default in one of his payments. Held, that this did not avail mortgagor, the purchaser having a binding agreement which would be nullified if mortgagor now let in to redeem. Purchaser had not yet received his transfer. Held, that the sale is complete under the agreement, and in the absence of some special circumstances the mortgagor will not now be allowed to redeem (*g*).

The implied power of Sale given by the Act respecting

(*a*) See *Perry v. Perry* (1884), 10 P. R. 275; *Lyon v. Ryerson* (1897), 17 P. R. 516; *Smith v. Brown* (1890), 20 O. R. 165.

(*b*) *Canada Permanent Building Society v. Tester* (1889), 19 O. R. 156.

(*c*) R. S. O. (1897), c. 126, Schedule B. (14).

(*d*) R. S. O. (1897), c. 121, s. 18.

(*e*) *Chatfield v. Cunningham* (1892), 23 O. R. 153.

(*f*) *Aldrich v. Canada Permanent Loan and Savings Co.* (1896), 27 O. R. 548, 24 O. A. R. 193; *Richmond v. Evans* (1861), 8 Gr. 508; *Thompson v. Holman* (1880), 28 Gr. 35; *Carruthers v. Hamilton Provident and Loan Society* (1898), 12 Man. R. 60; *Canada Permanent Mortgage Corporation v. Jesse*, *post*, p. 502m.

(*g*) *Saltman v. M'Coll*, 12 W. L. R. 146.

Mortgages of Real Estate (*h*) does not authorize the sale of timber without the land (*i*).

The mortgagee is liable for the full value if the property is sold at less than its value through want of care (*h*).

The mortgagee proceeding under the power of sale given in the Short Forms Act (*l*) may, if the equity is worth very little, exchange for other land instead of selling for money (*m*), but the rule is that a power of sale cannot be properly exercised by the mortgagee accepting other property in exchange (*n*).

A mortgagee cannot sell to himself and a sale so made will be set aside (*o*).

If an irregular or improper sale is made by the mortgagee, the mortgagor has his remedy by way of an action for damages (*p*).

R. purchased a mortgage of land from the mortgagee and, caused it to be assigned to his nominee who, by R.'s direction, took proceedings under the power of sale and sold and conveyed to H., another nominee of R., who then induced three other persons to join him in a purchase of the land at a large profit, concealing from them the fact that he was himself the real vendor. These co-purchasers paid three-fourths of the price at which the land was sold to them, and the land was conveyed to them and R. by H. and the conveyance registered, they not suspecting that the transaction was otherwise than as represented by R., and as on the face of the document it appeared to be.

In an action by the mortgagor to set aside the conveyances and for redemption, it was conceded that the sale to H. under the power was inoperative.

Held, that the three associates of R. were purchasers for

(*h*) R. S. O. (1897), c. 121, s. 18.

(*i*) *Stewart v. Rowsom* (1892), 22 O. R. 533; but the mortgagee may, under his power of entry, make the best provision he can for his own safety even to the cutting down of trees subject to an account; *Brethour v. Brooke* (1893), 23 O. R. 658, 21 O. A. R. 144.

(*k*) *Rennie v. Block* (1896), 26 S. C. R. 356.

(*l*) R. S. O. (1897), c. 126, Schedule B (14).

(*m*) *Smith v. Spears* (1892), 22 O. R. 286.

(*n*) *Smith v. Spear* (1893), 22 O. R. 286, explained and distinguished; *Winters v. McKinstrey* (1902), 14 M. L. R. 297; 22 Occ. N. 213; 23 Occ. N. 54.

(*o*) *Mitchell v. Kinnear* (1897), 33 C. L. J. 547; *Ellis v. Dellabough* (1869), 15 Gr. 583.

(*p*) *Campbell v. Imperial Loan Co.* (1908), 18 M. L. R. 144; 8 W. L. R. 502.

value without notice, and having registered their conveyance were not affected by the equity of the mortgagor to set aside the conveyance to H., nor by the knowledge which R. had of the mortgagor's rights, nor by the knowledge which their solicitor had, the same solicitor having acted for them who acted for R. in the proceedings taken under the power of sale; for R. had been guilty of a fraud upon the mortgagor, and he was committing a fraud upon his associates in the purchase by representing that a stranger was the vendor and that the price was four times as much as he had himself paid; and therefore notice to his associates could not be imputed of that which was within the knowledge of R. and the solicitor and which it was their interest to conceal(*q*). Held also that R.'s associates were entitled to costs against R.(*r*). Held, also, that, as an undivided one-fourth of the mortgaged premises remained vested in R., the plaintiffs were as to him entitled to redeem, and if on redemption he should not be in a position to reconvey the other undivided three-quarters, he must make compensation to them for the value of it(*s*).

The solicitor for the mortgagee cannot purchase(*t*).

A subsequent mortgagee may purchase under a sale by a prior mortgagee(*u*), and he does not thereby lose his right to proceed on his own mortgage against the mortgagor(*x*).

The mortgagor cannot by purchasing under the power of sale exercised by the first mortgagee set up the purchase against a second mortgage made by himself. V. having mortgaged certain lands to G., subsequently sold his equity of redemption in a portion of the lands to B., from whom he took a mortgage which he assigned to the plaintiff. G. subsequently sold the whole of the lands under a power of sale in his

(*q*) *Cameron v. Hutchison* (1869), 16 Gr. 526 applied.

(*r*) *Faulds v. Harper* (1886), 11 S. C. R. 639 followed.

(*s*) *Smith v. Hunt* (1901), 2 O. L. R. 134; and see *Finkelstein v. Locke* (Man.) (1907), 6 W. L. R. 173; and *Canada Permanent Mortgage Corporation v. Jesse* (1909), 11 W. L. R. 295.

(*t*) *Howard v. Harding* (1871), 18 Gr. 181; *Great West Life v. Lieb* (1909), 11 W. L. R. 632; and *Mitchell v. Rutherford* (1909), 12 W. L. R. 55.

(*u*) *Watkins v. McKellar* (1859), 7 Gr. 584.

(*x*) *Harron v. Yemen* (1883), 3 O. R. 126, *per* Armour, J., at p. 133.

mortgage, and B. became the purchaser. Held, that B.'s purchase under the power of sale in the first mortgage did not cut out but enured to the benefit of V. the second mortgagee (*y*).

A mortgagee may under his power of sale give time to the purchaser (*z*).

The mortgagee having sold under the power of sale must complete the sale. He may not abandon the sale and proceed on his other remedies (*a*).

A deed under power of sale should recite the power, the default, and the intention to sell and the notice (*b*).

When a sale is made by an agent under a power of attorney, and the agent took a promissory note for part of the purchase price and appropriated the proceeds, it was held that the power of attorney did not authorize a sale upon credit and the sale was invalid (*c*).

A purchaser under a power of sale which is made in an irregular manner and afterwards set aside is entitled to compensation for improvements made in the belief that he has obtained a legal title (*d*).

In order to set aside a sale for inadequacy of consideration the price paid must be so small as to raise a presumption of fraud (*e*).

The mortgagee exercising the power of sale under the Short Forms Act is a trustee for the mortgagor of the proceeds and must account to him for any surplus after payment of the principal, interest, and costs (*f*).

(*y*) *Boz v. Bridgman* (1875), 6 P. R. 234.

(*z*) *Beatty v. O'Connor* (1884), 5 O. R. 731.

(*a*) *Patterson v. Tanner* (1892), 22 O. R. 364.

(*b*) *Kelly v. Imperial Loan and Investment Co.* (1884), 11 O. A. R. 526; 11 S. C. R. 516; and *Chatfield v. Cunningham* (1892), 23 O. R. 153.

(*c*) *Rodburn v. Swinneg* (1889), 16 S. C. R. 297.

(*d*) *Carroll v. Robertson* (1868), 15 Gr. 173; *MLaren v. Fraser* (1870), 17 Gr. 567; and the Act Respecting the Law and Transfer of Property, R. S. O. (1897), c. 119, s. 30.

(*e*) *Chatfield v. Cunningham* (1892), 23 O. R. 153; *Latch v. Furlong* (1866), 12 Gr. 303; and Judgment of Street, J., *ib.* at p. 166.

(*f*) R. S. O. (1897), c. 126, Schedule B (14), and R. S. O. (1897), c. 121, s. 25; *Riddick v. Traders' Bank* (1892), 22 O. R. 449; *Giles v. The Hamilton Provident and Loan Society* (1895), 10 Man. R. 567; *Biggs v. Freehold Loan and Investment Company* (1899), 26 O. A. R. 232.

The mortgagee is entitled in an action for foreclosure or redemption to recover ten years' arrears of interest (*g*), but in an action for redemption by a second mortgagee the first mortgagee can only claim six years' arrears of interest (*h*).

The mortgagee may pay the surplus arising from a sale to the apparent owner of the equity of redemption unless he has actual notice of other claims (*i*).

A mortgagee holding any surplus out of which the wife of the mortgagor is entitled to dower may pay the same into Court (*k*).

The power of sale in a mortgage cannot be properly exercised by the mortgagee accepting other property in exchange instead of making a sale for money, unless perhaps in a case where it is clear that there is no value in the equity of redemption (*l*).

The mortgagee omitted to advertise the mortgaged property in any local paper, and the sale was at a town 70 or 80 miles distant. A sale for \$2800 was set aside, the Court holding that the property was sacrificed by the negligence of the mortgagee (*m*).

If the mortgagee has sold the mortgaged property under his power of sale, partly for cash and partly for credit by taking a mortgage, he must, as regards the original mortgagor, treat the mortgage as cash, and if he sells it for less than its face value, the mortgagor may bring an action for an account and so recover the surplus in the hands of the mortgagee (*n*). In such a case the mortgagor should before action make a demand for an account, otherwise he may be disallowed his costs, especially if he makes charges which he fails to substantiate (*o*). Such

(*g*) R. S. O. (1897), c. 72, s. 1, c. 133, s. 17; *Carroll v. Robertson* (1868), 15 Gr. 173; *Allan v. M'Tavish* (1878), 2 O. A. R. 278; *M'Donald v. M'Donald* (1886), 11 O. R. 187.

(*h*) *M'Micking v. Gibbons* (1897), 24 O. A. R. 586.

(*i*) *Harper v. Culbert* (1883), 5 O. R. 152.

(*k*) R. S. O. (1897), c. 164, ss. 7, 8, 9.

(*l*) *Smiths v. Spears* (1893), 22 O. R. 286, explained and distinguished; *Winters v. M'Kinstry* (1902), 14 Man. L. R. 294.

(*m*) *Carruthers v. Hamilton Provident and Loan Society* (1898), 12 Man. L. R. 60.

(*n*) *Beatty v. O'Connor* (1884), 5 Ont. 731, 747; *Reddick v. Traders' Bank of Canada* (1892), 22 Ont. 449. Ont. Rule 645.

(*o*) *Beatty v. O'Connor* (1884), 5 Ont. 731.

an action may be brought in the County Court if the balance claimed is within its jurisdiction (*p*).

As to exercise of power of sale by reason of interest overdue and action to restrain proceedings, see *Martin v. Hopkins* (1909), 13 O. W. R. 965.

In *Saskatchewan* time means mountain standard time. *Great West Life v. Hill* (1909), 2 Sask. L. R. 158.

In *Fox v. Hunter* (1910), 12 W. L. R. 87, a sale under direction of the Court was upheld.

(*p*) *Reddick v. Traders' Bank of Canada* (1892), 22 Ont. 449.

CHAPTER X.

Of the Creditor's right to Foreclosure or to Judicial Sale.

	PARAGRAPH
Section I.—To enforce Ordinary Mortgages	980—1012
,, II.—To enforce Judgment Debts	1013—1017
,, III.—To enforce Liens	1018—1019
,, IV.—To enforce Bottomry Bonds and other Maritime Securities	1020—1024
,, V.—Foreclosure or Sale in Bankruptcy	1025—1038

SECTION I.

Foreclosure or Sale to enforce Ordinary Mortgages.

<i>Nature of foreclosure</i>	980
<i>Foreclosure can only be by judicial process</i>	981
<i>Usual period allowed for redemption</i>	982
<i>Under chief clerk's certificate</i> .. .. .	..
<i>Equity of redemption may be released out of court so long as release not contingent on non-payment</i>	984
<i>Foreclosure not confined to mortgages of land</i>	985
<i>Foreclosure even where debt partly repaid</i>	986
<i>Judicial sale an alternative to foreclosure</i>	987
<i>Mortgagee may sue for foreclosure or sale without taking possession</i> ..	988
<i>Foreclosure on originating summons</i>	989
<i>Foreclosure may be combined with claim for personal judgment</i>	990
<i>Enforcing personal remedy reopens foreclosure</i>	991
<i>Dismissal of redemption action generally equivalent to foreclosure</i>	992
<i>Practice where several joint mortgagees and some refuse to be co-plaintiffs</i>	993
<i>How far mortgagee for trustees bound to see that money actually paid to them</i>	994
<i>Apart from statute sale could not be ordered except subject to mortgage or with mortgagee's consent</i>	995
<i>In Ireland sale always and foreclosure never ordered</i>	996
<i>Powers of sale conferred on court by statute</i>	997
<i>How far statutory powers differs from previous statutes</i>	998
<i>Party entrusted with sale not responsible for fraudulent acts of other parties to enhance the price</i>	999
<i>Consideration of powers of court to order sale independent of statute</i> ..	1000
<i>Apart from statute legal mortgagee only entitled to foreclosure</i>	1001
<i>Question whether apart from statute equitable mortgagee's proper remedy was foreclosure or sale</i>	1002
<i>Legal estate vested and possession ordered</i>	1003

Paragraphs
980—982

PARAGRAPH

<i>Right of mortgagee by deposit of title deeds</i>	1004
<i>Right of equitable mortgagee by agreement</i>	1005
<i>Other instances where sale is the appropriate remedy</i>	1006
<i>Sale instead of foreclosure where mortgagor is an infant</i>	1007
<i>Where mortgagor becomes interested in security in fiduciary position sale is proper</i>	1008
<i>Mortgagees of public undertakings cannot have either foreclosure or sale</i> ..	1009
<i>No foreclosure against Crown</i>	1010
<i>Security by way of trust for sale gives no right to foreclosure</i>	1011
<i>Registered chargee under Land Transfer Acts may enforce foreclosure or sale</i>	1012

Nature of
foreclosure.

980. Upon non-payment of the debt when due (and where no date is fixed, after reasonable notice (*a*)), and notwithstanding that there may be a power of sale in the mortgage (*b*), the creditor may commence an action in the Chancery Division (which can now, in simple cases, be done by originating summons) (**989**), asking that the equity of redemption of the debtor and all persons claiming through him (including *puisne* incumbrancers), may be barred, so as to vest the mortgaged property absolutely in the mortgagee. Such an action is called “a foreclosure action,” and the relief sought “foreclosure,” and if the relief be granted, the mortgage is said to be “foreclosed.”

Foreclosure
can only be
by judicial
process.

981. Unlike the remedy by sale (which can be conferred by the instrument creating the mortgage) there can be no foreclosure except by judicial decree in an action to which the mortgagor must be a defendant, however remote his chance of redeeming may be (*c*). And, except by consent, it will not be granted until an account is taken of what is owing on the mortgage for principal, interest and costs of the action (*d*), and until default is made for a certain period, after the balance on such account has been ascertained. Any special matter affecting the account (such as a valuation of the security in bankruptcy), ought to be pleaded and noticed in the judgment (*e*).

Usual period
allowed for
redemption.

982. The usual period allowed for redemption after the account has been taken is six months; but where the action is not merely against the mortgagor, but also against subsequent incumbrancers, and the subsequent incumbrancers appear and ask for successive periods of redemption and there is no question of priority between them (but not otherwise (*f*)), they will be allowed such successive

(a) *Fitzgerald's Trustee v. Mellersh*, [1892] 1 Ch. 385.

(b) *Wayne v. Hanham*, 9 Hare, 62; *Hutton v. Sealy*, 27 L. J. Ch. 263.

(c) *Moore v. Morton* (1886), W. N. 196.

(d) If the mortgagee claims costs, charges, and expenses beyond his costs of action, he must make out a special case for them at the hearing: *Bolingbroke v. Hinde*, 25 Ch. D. 795.

(e) *Sanguinetti v. Stuckey's Bank* (No. 2), [1896] 1 Ch. 502.

(f) *Bartlett v. Rees*, L. R. 12 Eq. 395; *General Credit, etc., Co. v. Glegg*, 22 Ch. D. 549; *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686; *Doble v. Manley*, 28 Ch. D. 664; *Smith v. Olding*, 25 Ch. D. 462; *Platt v. Mendel*, 27 Ch. D. 246; but conf. *Lewis v. Abedare Co.*, 53 L. J. Ch. 741.

periods (*g*), the party first entitled to redeem being allowed six months, and each of the others successive periods of three months more (1712). During the period allowed for redemption a mortgagee can only exercise his power of sale by leave of the court (*h*).

Paragraphs
982—987

983. On the day fixed, and at the place named in the Master's certificate, some person attends on behalf of the mortgagee, and if the principal, interest, and costs are not paid to him, a final order is applied for on "motion of course," founded on an affidavit of non-payment. The order obtained on this motion is called an "order absolute," and (subject to certain rights of "opening the foreclosure" (*i*), hereinafter referred to) it bars the equity of redemption, and gives the estate to the mortgagee absolutely and beneficially. It is immaterial that the person who attends on behalf of the mortgagee to receive payment of the debt is not furnished with a power of attorney, if no one in point of fact attends on behalf of the mortgagor to pay (*k*). Order absolute.

984. Although the equity of redemption can only be foreclosed by order of court (7981), and cannot be barred by a bargain made contemporaneously with the mortgage (1396), it must not be assumed that the mortgagor cannot release the equity of redemption so long as the release is not made contingently on the non-payment of the debt (1384, 1396). Equity of redemption may be released out of court so long as release not contingent on non-payment.

985. Foreclosure is a remedy of the mortgagee which is not confined to mortgages of land. It is equally applicable to mortgages of chattels (*l*), and *choses in action* (*m*). The mere pledgee of a chattel cannot, however, foreclose, for he has only a special legal property, and not a legal estate which can be made absolute by renewal of the equity to redeem (*n*). Foreclosure not confined to mortgages of land.

986. The right to foreclose exists, although the mortgagee has recovered part of the debt, so long as he has not been fully paid (*o*). Foreclosure even where debt partly repaid.

987. The relief by judicial sale is intimately connected with the right of foreclosure, for which in many cases in England, and always in Ireland, it is substituted; and it will be convenient to point out Judicial sale an alternative to foreclosure.

(*g*) *Platt v. Mendel*, 27 Ch. D. 246. But each case has to be judged on its merits, and sometimes an additional three months is allowed to the second person, and a further three months to all the others. *Smithett v. Hesketh*, 44 Ch. D. 161.

(*h*) *Stevens v. Theatres, Limited*, [1903] 1 Ch. 857.

(*i*) In order to entitle a mortgagor to open a foreclosure the security must be simple (*Thornhill v. Manning*, 1 Sim. (N.S.) 451), and an immediate payment of interest and costs: *Coombe v. Stewart*, 13 Beav. 111.

(*k*) *Cox v. Watson*, 7 Ch. D. 196; *King v. Hough*, [1895] W. N. 60.

(*l*) *Harrison v. Hart*, 2 Eq. Cas. Abr. 6; *Tancred v. Potts*, 2 Fonbl. Eq. 261 n. Glanville indicates an equivalent remedy, Book 10, caps. 6—8.

(*m*) *General Credit Co. v. Glegg*, 22 Ch. D. 549; *Ricketts v. Ricketts*, [1891] W. N. 29.

(*n*) *Carter v. Wake*, 4 Ch. D. 605; *Fraser v. Byas*, 13 R. 452 (aff. November 8th, 1895).

(*o*) *Lockhart v. Hardy*, 9 Beav. 349; *Palmer v. Hendrie*, 27 Beav. 349.

Paragraphs
987—990

in the first place, the nature and incidents of the form of suit in which one or other of these remedies is decreed.

Mortgagee
may sue for
foreclosure or
sale without
taking
possession.

988. The mortgagee may commence his action (*p*) for foreclosure or sale of the mortgaged estate without taking possession (*q*), which the court will never compel him to do, because he would become liable to an account. But if, having been in possession, he omit to state the fact in the pleadings, the omission may affect his right to costs (*r*). And where the security is copyhold he may sue without taking admittance (*s*). He is not allowed to debate the title to the estate, because the course of the court in a foreclosure suit is only to take away the equity of redemption, and to leave the plaintiff to such remedy as he has, but not to amend it (*t*).

Foreclosure
on originating
summons.

989. By Order LV. r. 5*a*, a simple and summary procedure is allowed in simple cases, where a mortgagee desires an order for foreclosure or sale or possession. In such cases, an originating summons may be issued in the judge's chambers, upon which the ordinary order may be made for the usual account, and on default for foreclosure, or for an immediate sale, or for immediate possession. If, however, questions of priority arise (*u*), or if, in addition, an order for personal payment is desired, an action by writ is essential (*x*).

Foreclosure may be
combined
with claim
for personal
payment.

990. In that case a prayer for personal payment may be combined with an alternative prayer for foreclosure (*y*), and an action for foreclosure is not an action for the recovery of land which prevents it from being joined with an action for another cause (*z*). Where a plaintiff asks for personal payment (and therefore has to proceed by writ), he will be allowed the extra costs occasioned by such procedure, even although he does not get a personal order (*u*), unless he withdraws his claim, in which case (even though the withdrawal is necessitated by the mortgagor's bankruptcy) he will only be allowed the cost of a summons (*a*). As to judgment for immediate payment, see *ante* (806).

(*p*) Actions for the foreclosure and redemption of mortgages are assigned to the Chancery Division of the High Court of Justice. (Judicature Act, 1873, s. 34 (3).)

(*q*) *Lord Penrhyn v. Hughes*, 5 Ves. 99.

(*r*) *Binnington v. Harwood*, Turn. & Russ. 477.

(*s*) *Sutton v. Stone*, 2 Atk. 101.

(*t*) *Anon.*, 2 Ch. Ca. 244. "And this," adds the reporter, "was the true and ancient course, though of late sometimes the contrary hath been done." (30 Car. 2.)

(*u*) *Re Giles, Real and Personal Advance Co. v. Michell*, 43 Ch. D. 391.

(*x*) *Brooking v. Skeewis*, 58 L. T. 73.

(*y*) *Dymond v. Croft*, 3 Ch. D. 512. As to form of order in such case, see *Hunter v. Myatt*, 28 Ch. D. 181; *Farrer v. Lacy, Harland & Co.*, 31 Ch. D. 42. For form where debt is to be paid by instalments, see *Greenough v. Littler*, 15 Ch. D. 93; and where mortgagee is in receipt of rents, see *Jenner-Fust v. Needham*, 31 Ch. D. 500, and 32 Ch. D. 582.

(*z*) *Tawell v. Slate Co.*, 3 Ch. D. 629; Rules 1883, Order XVIII.; but see *Hoar v. Loe*, W. N. (1884) 241.

(*a*) *Barr v. Harding*, 58 L. T. 74.

991. It must be borne in mind, however, that if a mortgagee first sues for and obtains a decree absolute for foreclosure, and afterwards proceeds to sue for, *or* to levy execution on a judgment for personal payment, the effect is to reopen the foreclosure and give the mortgagor a renewed right to redeem. And if he has (by sale or otherwise) put it out of his power to restore the estate, he will be precluded from pursuing his personal remedy (*b*).

Paragraphs
991—995

Enforcing
personal
remedy
re-opens
foreclosure.

992. It may be convenient to mention at this place that if a mortgagor sues for redemption of a legal mortgage and his action be dismissed (except for want of prosecution), the result is equivalent to a decree of foreclosure (*c*). In the case, however, of an equitable mortgage, the dismissal of such an action does not have the same effect (*c*).

Dismissal of
redemption
action
generally
equivalent to
foreclosure.

993. A person interested in part only of a sum due on mortgage, cannot sue for foreclosure on a corresponding part of the estate (*d*). His remedy is to make the other mortgagees, if they refuse, as they may, to join in his suit, defendants; upon which an account will be directed of what is due to the plaintiff, and the other mortgagees; and on payment or default, re-conveyance or foreclosure will be decreed in the usual way (*e*). And so if there be several joint mortgagees, one of them may sue for foreclosure though the others dissent. The latter should be made defendants, and the judgment will be for the benefit of all (*f*).

Practice
where several
joint mort-
gagees, and
some refuse
to be co-
plaintiffs.

994. If the mortgage be made by trustees, authorized to raise money by mortgage, it is not necessary for the mortgagee's title to foreclosure, to show that the money reached the hands of the trustees, *if they have given a receipt*; nor that it was duly invested, though it be alleged that the money did not reach their hands, where the mortgagee was no party to the mis-application. And where the original mortgagee is not bound to inquire, his assignee, being a purchaser with the legal estate, is not affected by such a misapplication (*g*).

How far
mortgagee
from trustees
bound to see
that money
actually paid
to them.

995. Sale may be ordered where it is the proper remedy (*h*), or under the Act of 1881 (**997**), though foreclosure only be prayed, and though there be no right to foreclosure; but except under the statutory powers of the court no sale can be made of a mortgaged estate as against the mortgagee with a paramount title, but with or without

Apart from
statute, sale
could not be
ordered ex-
cept subject
to mortgage
or with

(*b*) *Lockhart v. Hardy*, 9 Beav. 349; *Palmer v. Hendrie*, 28 Beav. 341.

(*c*) *Marshall v. Shrewsbury*, L. R. 10 Ch. 250.

(*d*) *Palmer v. Earl of Carlisle*, 1 Sim. & St. 423. See *Remer v. Stokes*, 4 W. R. 730.

(*e*) *Davenport v. James*, 12 Jur. 827.

(*f*) *Luke v. South Kensington Hotel Co.*, 11 Ch. D. 121.

(*g*) *Locke v. Lomas*, 5 De G. & Sm. 326.

(*h*) *Jenkin v. Row*, 5 De G. & Sm. 107.

Paragraphs
995—998

his express consent, without which the sale can only be subject to his mortgage (*i*).

mortgagee's
consent.

The course is to decree a sale, free from the mortgagee's security if he concurs, but subject to it if he does not; and if he be a party to the suit, he will be required at once to consent or to refuse (*k*).

In Ireland
sale always,
and fore-
closure never
ordered.

996. In Ireland the decree in a foreclosure suit is always for sale (*l*); but the Irish form of decree does not differ in its nature from a foreclosure decree. It is strictly a decree against the estate, and is made in the same form, whether the security affect the estate only, or reserve a personal remedy also against the debtor (*m*).

Powers of
sale conferred
on court by
statute.

997. The power of sale in a foreclosure suit, vested in the Court of Chancery by 15 & 16 Vict. c. 86, s. 48, has been superseded by the provision (not extending to Ireland) of the Conveyancing Act, 1881, s. 25, (repealing s. 48 of the former Act,) that in any action brought either before or after the commencement of the Act, whether for foreclosure or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of *the mortgagee or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person*, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale, and to secure performance of the terms (**998**).

But in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them. And the court may, if it thinks fit, direct any such sale without previously determining the priorities of incumbrancers.

How far
statutory
power differs
from previous
statutes.

998. The statute, like that which preceded it, gives no absolute right to the parties to require a sale, but a power to the court to decree it; but it differs from the former Act by omitting from the power the restrictive words "instead of foreclosure." Under it the order for sale may be made at any time before the foreclosure

(*i*) *Langton v. Langton*, 7 De G. M. & G. 30. In partition suits, where one of the owners is in possession as transferee of a mortgage of the entirety, the sale will be made subject to his security. (*Waite v. Bingley*, 21 Ch. D. 674; *Re Hardiman*, *Pragnell v. Batten*, 16 Ch. D. 360.)

(*k*) *Wickenden v. Rayson*, 6 De G. M. & G. 210.

(*l*) *Hutton v. Mayne*, 3 Jo. & Lat. 586; and the Irish Chancery Reports, *passim*.

(*m*) *Wilson v. Lady Dunsany*, 18 Beav. 293; so in Jamaica, *Gordon v. Horsfall*, 5 Moo. P. C. 393.

has been made absolute (*n*); and it is no objection to the order that the mortgagee has had an express power of sale (*o*). The object of the legislature is to avoid the delay and expense occasioned by successive redemptions, and the court has a considerable discretion in applying its power, which it exercises with a view to the general benefit of the persons interested, without injury to any of them. Sales have been refused under the former Act, upon evidence that the land was likely to increase in value, and would not fetch its value upon an immediate sale (*p*); and also where, by reason of the deeds being in the hands of a purchaser without notice, from whom it refused to take them, the court was unable to complete the title (*q*). Probably these would be good reasons for not ordering a sale under the Act of 1881. It has also been held under the latter Act, that where the mortgaged property is in several places, and cannot be sold as a whole, and some part is more valuable than others, the risk of selling merely the most valuable part and leaving the mortgagee saddled with the worthless part, was a good reason for refusing a sale requested by the second mortgagee (*r*).

The powers of the former statute were at one time acted upon with some reluctance; but later (and under the larger powers of the present Act) sales have been more freely ordered, especially when the request has come from the mortgagee (*s*). Where a fourth mortgagee demanded a sale and the conduct of it, his claim was allowed upon his paying in to court 10 percent. on his valuation of the property to secure the first mortgagee against loss (*t*). The sale may be made out of, but the purchase-money must be paid into, court (*u*).

999. A person entrusted with the conduct of the sale of mortgaged property, is not responsible for the fraud of other parties to the suit who act as or engage "puffers" (*x*).

An order for sale of mortgaged property does not prevent the creditor pursuing his other remedies, *ex. gr.*, presenting and prosecuting a bankruptcy petition against the mortgagor (*y*).

Party entrusted with sale not responsible for fraudulent acts of other parties to enhance the price.

(*n*) *Union Bank of London v. Ingram*, 20 Ch. D. 463.

(*o*) *Hutton v. Sealy*, 4 Jur. (N.S.) 450; *Wayne v. Hanham*, 9 Hare, 62.

(*p*) *Hurst v. Hurst*, 16 Beav. 372, and see *Provident Clerks' Association v. Lewis*, 62 L. J. Ch. 89.

(*q*) *Heath v. Crealock*, L. R. 10 Ch. 22.

(*r*) *Provident Clerks' Association v. Lewis*, 62 L. J. Ch. 87.

(*s*) For decisions under the former Act see *Hiorns v. Holtom*, 16 Jur. 1077; *Bellamy v. Cockle*, 18 Jur. 465; *Wickham v. Nicholson*, 19 Beav. 38; *Robert v. Price*, 1 W. R. 303.

(*t*) *Norman v. Beaumont*, W. N., [1893] 45 (C. A.); and see also as to security required from mortgagors who demand a sale, *Woolley v. Coleman*, 21 Ch. D. 169, and *Brewer v. Square*, [1892] 2 Ch. 111.

(*u*) *Woolley v. Coleman*, 21 Ch. D. 169; *Davies v. Wright*, 32 Ch. D. 220; *Brewer v. Square*, [1892] 2 Ch. 111.

(*x*) *Union Bank v. Munster*, 37 Ch. D. 51.

(*y*) *Re Kelday*, 36 W. R. 585.

Paragraphs **1000.** Although the statute of 1881 has greatly enlarged the former powers of the court, and has made them applicable, as is shown by the interpretation clause, to equitable securities and charges, yet as the power itself is to a great extent discretionary, it may be useful to consider in what cases, and to what extent, a sale of incumbered property may be decreed by the Chancery Division of the High Court independently of the statutory power.

Consideration of powers of court to order sale independently of statute. **1001.** The strict right of the legal mortgagee is foreclosure; and, independently of the statute, he had no general right to a sale (z), although the mortgagee of an advowson, or of a reversion, and in some cases he who has a scanty security, is entitled to that relief (**1006**).

Apart from statute legal mortgagee only entitled to foreclosure. **1002.** As to the rights of the equitable mortgagee, there has been some difference of opinion. But (in accordance with the principle that where the equitable security is such as to entitle its holder to call for a complete legal security (a) the mortgagee's remedy ought to correspond as nearly as may be with that of a legal mortgagee (b)), a right to foreclosure clearly belongs to the mortgagee of the equity of redemption; who is entitled to this relief as against the mortgagor and subsequent mortgagees, without redeeming the first mortgagee (c), subject to whose mortgage he has the best right to call for the legal estate.

Question whether apart from statute equitable mortgagee's proper remedy was foreclosure or sale. **1003.** In all such cases (where there is no prior legal mortgagee) the decree for foreclosure is accompanied by an order to convey the legal estate (if the mortgaged property be land) or to transfer the property (where it consists of stocks or shares, etc.) (d) to the mortgagee, and, in default of compliance, a vesting order will be made in that behalf.

Legal estate vested, and possession ordered.

Whether the mortgage be legal or equitable, possession, as well as foreclosure, can be claimed by the plaintiff who is out of possession; and where he has omitted to claim it in his writ or originating summons, he may nevertheless serve notice of motion on the defendant for an order for possession (e). The order will not, however, be made *ex parte* (f). The order for delivery of possession should contain a description of the property (g).

(z) *Tipping v. Power*, 1 Hare, 405.

(a) *Parker v. Housefield*, 2 Myl. & K. 419; *Footner v. Sturgis*, 5 De G. & Sm. 736; *Jones v. Bailey*, 17 Beav. 582.

(b) *Tipping v. Power*, 1 Hare, 405; *Footner v. Sturgis*, 5 De G. & Sm. 736. See *Toft v. Stephenson*, 7 Hare, 1; and *Tennant v. Trenchard*, L. R. 4 Ch. 537.

(c) *Slade v. Rigg*, 3 Hare, 35; *Rose v. Page*, 2 Sim. 471; *Richards v. Cooper*, 5 Beav. 304.

(d) *Ricketts v. Ricketts*, [1891] W. N. 29.

(e) *Best v. Applegate*, 37 Ch. D. 42; *Keith v. Day*, 39 Ch. D. 452.

(f) *Le Bas v. Grant*, [1895] W. N. 28.

(g) *Thynne v. Sarl*, [1891] 2 Ch. 79, but see *Withall v. Nixon*, 28 Ch. D. 413.

1004. The deposit^{ee} of title deeds is also entitled to foreclosure, where the deposit is accompanied by an agreement to execute a legal mortgage (*h*); and so he is, according to the modern authorities, where there is a simple deposit or a memorandum without an agreement to execute a mortgage (*i*), unless the terms of the agreement exclude the right to a legal mortgage (*k*). This rule appears to be the necessary consequence of the principle that the deposit is of itself evidence of an agreement to make a legal security, which the court will carry into effect against the mortgagor or any who claim under him with actual or constructive notice of the deposit (*l*); in accordance with which, several well-known forms of decree (*m*) (one of which is said to have been penned by Lord *Eldon* himself) direct, that upon default in payment, the deposit^{ee} shall be entitled to the premises freed from all equity of redemption, and shall have an absolute conveyance executed by the depositor or owner of the equity of redemption. As to the right to sale of equitable mortgagees by deposit alone, the Court of Appeal is stated, in the report of the case of *Pryce v. Bury* (*n*), to have laid down not only that such a mortgagee is entitled to foreclosure, but that he is not entitled to sale. But it does not appear that any authorities were cited, or even that the question was argued; and the report can hardly be accepted as an authority for overruling decisions by Lord *Thurlow*, Sir *J. Leech*, Lord *Cottenham*, and other judges, that mere deposit^{ees} of deeds by way of security are entitled to sale (*o*), especially as a deposit of deeds by way of security implies a contract for a mortgage (*p*) which, as already observed, now implies a power of sale.

1005. Where the security consists of an agreement to execute a mortgage with power of sale, the mortgagee is also entitled to a sale (*q*); and it was held that he had the same right where the

Paragraphs
1004—1005

Right of
mortgagee
by deposit of
title deeds.

Right of
equitable
mortgagee by
agreement.

(*h*) *Perry v. Keane*, 6 L. J. (N.S.) Ch. 67; *Moore v. Perry*, 1 Jur. (N.S.) 126; *Jones v. Bailey*, 17 Beav. 582; *Cox v. Toole*, 20 Beav. 145; *Underwood v. Joyce*, 7 Jur. (N.S.) 566. See also *Frail v. Ellis*, 16 Beav. 350.

(*i*) *Redmayne v. Forster*, L. R. 2 Eq. 467; *Pryce v. Bury*, L. R. 16 Eq. 153 n.; *James v. James*, L. R. 16 Eq. 153.

(*k*) *Sporle v. Whayman*, 20 Beav. 607. A mere charge gives no right to foreclosure. *Shea v. Moore*, [1894] 1 Ir. R. 158; *Tennant v. Trenchard*, L. R. 4 Ch. 537, 542.

(*l*) *Birch v. Ellames*, 2 Anst. 427; *Exp. Wright*, 19 Ves. 258; *Exp. Wise*, Mont. & M. 65, per SHADWELL, V.-C.; *Malone v. Geraghty*, 3 Dru. & War. at p. 239, per Lord ST. LEONARDS.

(*m*) *Newton v. Aldous*, and other cases cited in *Parker v. Housefield*, 2 Myl. & K. at p. 421. And see *Birch v. Ellames*, *supra*; *Parker v. Housefield*, 2 Myl. & K. 419; *Tylee v. Webb*, 6 Beav. 552; and unreported decision by TURNER, V.-C., cited 1 Johns. & H. 127. (*n*) L. R. 16 Eq. 153, n.

(*o*) *Meux v. Ferne*, and *Spring v. Allen*, cited in *Parker v. Housefield*, 2 Myl. & K. at p. 422; *Russel v. Russel*, 1 Bro. C. C. 269; *Meller v. Woods*, 1 Keen, 16; *Pain v. Smith*, 2 Myl. & K. 417; *Tipping v. Power*, 1 Hare, 405; *King v. Leach*, 2 Hare, 57; and see *Price v. Carver*, 3 Myl. & Cr. 161. *Samble v. Wilson*, 5 N. R. 394, before Lord ROMILLY, is *contra*.

(*p*) Per Lord COTTENHAM, M.R.; *Parker v. Housefield*, 2 Myl. & K. 419.

(*q*) *Lister v. Turner*, 5 Hare, 281; *Woof v. Barron*, W. N. (1873) 71; *Seton on Decrees*, ed. 6, 2052.

Paragraphs 1005—1006 agreement was to execute “a good and effectual mortgage when required” (*r*). This appears to conflict with the terms of the judgment of *Malins*, V.-C., in the case of *Backhouse v. Charlton* (*s*), but may be supported on the ground, that independently of the powers of the court, a mortgage, in the absence of an expressed intention to the contrary, now carries with it a statutory power of sale; and also on the ground that where, as in the case of the *York Building Company*, the agreement is only to execute a mortgage when required, the creditor may waive his right to the legal security and its consequent relief, and claim a sale under his equitable charge (*t*). There can, however, be no sale in respect of a mere parol agreement to deposit a deed, as such a contract does not amount to an equitable mortgage (*u*).

Other instances where sale is the appropriate remedy.

1006. There are also other cases in which for special reasons connected with the subject of the security, or the persons interested, sale is the proper remedy. For instance, it seems that the legal or equitable mortgagee has a general right to a sale, where the security is, or is thought to be, scanty (*x*); and it is clear, that he may have this relief if he commence his action after the mortgagor’s death, stating that the personal estate is deficient (*y*). The mortgagee of a reversion (*z*) was also entitled to a sale on account of the unproductiveness of the security; and it is probably for the same reason that this is the proper relief for the mortgagee of an advowson (*a*). But the mortgagee both of an advowson (*b*) and of a reversion (*c*) is entitled to foreclosure; although in the latter case the subject of the security be a chose in action, and the mortgagee has an express power of sale, and is not in possession of the legal interest; and he is not obliged to submit to a sale.

Where charitable trustees hold mortgages of land which become liable to foreclosure, or in which the equity of redemption is barred or released, they are obliged by statute (*d*) to hold the lands in

(*r*) *York Union Banking Co. v. Artley*, 11 Ch. D. 205.

(*s*) 8 Ch. D. 444.

(*t*) See *Matthews v. Goodday*, 8 Jur. (N.S.) 90.

(*u*) *Exp. Coombe*, 4 Mad. 249.

(*x*) *Per* Lord HARDWICKE, *Earl of Kinnoul v. Money*, 3 Swans. 202, n., *Wiseman v. Carbonell* (1 Eq. Cas. Abr. 312), where, although there was a bankruptcy, the sale was upon a bill in equity, the security being “deficient.” The general right where the security is scanty, is perhaps not quite clear. In *Dashwood v. Bithazey* (Mos. 196), a sale was asked because the security was “defective;” by which it has been thought an imperfect, and not a deficient security was meant; but this context, it is submitted, rather shows that the word was used in the latter sense, and the authority of Lord Hardwicke is not to be lightly passed over.

(*y*) *Daniel v. Skipwith*, 2 Bro. C. C. 154.

(*z*) *How v. Vignes*, 1 Ch. R. 18 (33, ed. 3).

(*a*) *Mackensie v. Robinson*, 3 Atk. 559.

(*b*) *Gardiner v. Griffith*, 2 P. Wms. 403; *Long v. Storie*, 3 De G. & Sm. 308.

(*c*) *Slade v. Rigg*, 3 Hare, 35; *Wayne v. Hanham*, 9 Hare, 62.

(*d*) 33 & 34 Vict. c. 34, s. 2.

trust to sell the same; and if any decree is made in any suit for redeeming or enforcing such security, such decree is to direct a sale (in default of redemption) and not a foreclosure. Paragraphs 1006—1010

1007. It was also the practice in the case of an infant heir or devisee of the equity of redemption (*e*), where it was more beneficial for the infant (and in an early case it was said to be proper (*f*)), to direct a sale, with the consent of the mortgagee (*g*), for payment of debts instead of foreclosure; because a sale would bind the infant but a foreclosure would, as a general rule (*h*), entitle him to a day to show cause against the decree after he came of age. The practice of selling where the court finds it to be for the benefit of the infant, is now followed in the ordinary course of foreclosure suits (*i*); but as to the mortgagee's consent the sale must of course be subject, it is presumed, to the provisions of the Conveyancing Act, 1881, s. 25 (2). Sale, instead of foreclosure, where mortgagor is an infant.

1008. If the mortgagor acquires an interest in the security,—as if he become the executor of the mortgagee, or if he be a trustee of the mortgaged estate,—his position as a person whose duty and interest are conflicting, makes it improper that he should have a decree for foreclosure; and sale is the proper remedy (*k*). Where mortgagor becomes interested in security in fiduciary position sale is proper.

1009. As previously stated (174), the mortgagees or debenture holders of companies incorporated under Acts of Parliament for carrying out public works, such as railways, canals, tramways, gas or water works, and the like, cannot either foreclose or sell; and the same remark applies *à fortiori* to the mortgagees of commissioners and other non-trading corporations. Mortgagees of public undertakings cannot have either foreclosure or sale.

1010. There can be no decree of foreclosure against the Crown; and as the Crown cannot upon a sale be compelled to convey, the ordinary course was to direct that the mortgagee should hold and enjoy the estate until the Crown should think proper to redeem (*l*), or until the security should be satisfied (*m*), where the mortgagee's interest in the security would allow the making of such an order. If the order could not be so made, and the legal interest was in the Crown, the bill was dismissed; but latterly orders for the sale both of freeholds and leaseholds have been made, it being understood that the Crown was not pledged to make any grant to a purchaser; No foreclosure against Crown.

(*e*) *Davis v. Dowding*, 2 Keen, 245; *Scholefield v. Heafield*, 7 Sim. 667; 8 Sim. 470.

(*f*) *Booth v. Rich*, 1 Vern, 295.

(*g*) *Mondey v. Mondey*, 1 Ves. & B. 223; *Adkins v. Graves*, 3 L. J. (o.s.) Ch. 62.

(*h*) See *Wolverhampton and Staffordshire Banking Co. v. George*, 24 Ch. D. 707.

(*i*) *Redshaw v. Newbold*, 12 Jur. 833; *Cockburn v. Aukett*, 3 W. R. 641; *Clinton v. Bernard*, Dru. 287.

(*k*) *Lucas v. Seale*, 2 Atk. 56; *Tennant v. Trenchard*, L. R. 4 Ch. 537.

(*l*) *Lutwick's Case*, cited in *Reeve v. Att.-Gen.*, 2 Atk. 223; *Reeve v. Att.-Gen.* ib.

(*m*) *Hodge v. Att.-Gen.*, 3 Y. & C. 342.

Paragraphs or liberty may be given to apply in chambers for an order for sale (*n*).
 1010—1012 And in a suit for the administration of assets, in which the mortgage was for a term, and the reversion had become vested in the Crown, the mortgagee was declared to be at liberty to accept the estate in discharge of his debt, and was declared to be the purchaser thereof, with liberty to apply to the Crown for a grant of the fee, and in the meantime to hold absolutely (*o*) (1762).

Security by way of trust for sale gives no right to foreclose.

1011. A conveyance, charging an estate with a sum of money and interest, and subject thereto in trust for a person therein named, with a power enabling the person in whose favour the charge was made, to sell on default in payment after notice, gives no right to foreclosure; there being no condition upon the breach of which a forfeiture can arise (*p*) (22). Nor can there be a foreclosure, for the same reason, upon a mere trust for sale in favour of the creditor, though there be added covenants for repayment of the debt and interest, and for title, where they are in accordance with the trusts. The proper relief in suits to realize such securities is a sale (*q*). And there will be neither foreclosure nor sale of a reversionary interest where, upon the construction of the security, it appears that the fund is to be dealt with only when it becomes payable (*r*).

It appears, therefore, that the cases are rare in which a mortgagee, whether legal or equitable, is not either entitled as of right to require a sale by virtue of his security alone, or bound to submit to it; though the court will exercise its discretion as to the time and manner of the sale, and the terms upon which it is ordered to be made.

Registered charge under Land Transfer Acts may enforce foreclosure or sale.

1012. In the case of a registered charge under the Land Transfer Acts, 1875 and 1897 (*s*), the registered proprietor of the charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money at the appointed time.

(*n*) *Hancock v. Att.-Gen.*, 10 Jur. (N.S.) 557; *Sutton v. Smith*, cited 10 Jur. (N.S.) 557 note; *Bartlett v. Rees*, L. R. 12 Eq. 395; (foll. *Tufnell v. Nichols*, 56 L. T. 152; W. N., (1887) 52; and see *Prescott v. Tyler*, 1 Jur. 470. Account of what is due on security; order for sale and payment of purchase-money into court; mortgagee to be paid principal, interest and costs; Att.-Gen. to be at liberty to apply for payment of balance after deducting the costs. In *Scott v. Roberts*, 4 W. R. 499, the order, for special reasons, directed foreclosure against mortgagees prior to the crown, and sale if they should not redeem.

(*o*) *Rogers v. Maule*, 1 Y. & C. Coll. C. 4.

(*p*) *Sampson v. Pattison*, 1 Hare, 533. See *Watson v. Waltham*, 2 Ad. & El. 485.

(*q*) *Jenkin v. Row*, 5 De G. & Sm. 107; *Schweitzer v. Mayhew*, 31 Beav. 37; *Locking v. Parker*, L. R. 8 Ch. 30.

(*r*) *Stamford, etc., Banking Co. v. Ball*, 4 De G. F. & J. 310.

(*s*) 38 & 39 Vict. c. 87, s. 26; 60 & 61 Vict. c. 65.

SECTION II.

Paragraph
1013**Foreclosure and Sale to Enforce Judgment Debts.**

	PARAGRAPH
<i>Questionable whether judgment creditors entitled to foreclosure</i>	1013
<i>Clearly entitled to sale</i>	1014
<i>Meaning of "delivered in execution"</i>	1015
<i>No order for sale of a reversionary interest</i>	1016
<i>Statutory right to sale is absolute except where it would contravene public policy</i>	1017

1013. Before the statute 1 & 2 Vict. c. 110, s. 13, a judgment creditor could clearly have no foreclosure, for he had but a general charge upon his debtor's land, and had no right even to a sale in the debtor's lifetime (*t*). But a judgment under the above Act is a specific charge, and the judgment creditor is entitled to such and the same remedies in equity, against the hereditaments charged by virtue of the Act, or any part thereof, as he would be entitled to in case the person, against whom the judgment shall have been entered up, had power to charge, and had by writing under his hand agreed to charge (not mortgage) the same hereditaments, with the amount of the judgment debt and interest thereon. After the passing of this Act, sales were constantly decreed at the suit of judgment creditors (*u*); and it was said that no foreclosure could be had upon this form of security, on the ground that it was a mere charge (*x*). But foreclosure decrees were afterwards made at the suit of judgment creditors (*y*). The judgment creditor, however, has also under the Act that which is equivalent to an agreement to execute a legal mortgage, which gives a right to foreclosure. And it has been laid down by high authorities, that the statute confers upon the judgment creditor an equitable estate (*z*), and by giving him the same remedy as if the debtor had signed a memorandum, makes him an equitable mortgagee (*a*). It seems, therefore, to follow that he has the same right as an equitable mortgagee to foreclosure. And decrees for foreclosure have, in several cases, been made in his favour (*b*), although such a decree was refused by Sir G. Jessel, M.R. (*c*).

(*t*) *Neate v. Duke of Marlborough*, 3 Myl. & Cr. 407.

(*u*) *Clare v. Wood*, 4 Hare, 81, and *Carlton v. Farlar*, 8 Beav. 525; *Smith v. Hurst*, 10 Hare, 30, 50.

(*x*) *Footner v. Sturgis*, 5 De G. & Sm. 736.

(*y*) *Ford v. Wastell*, 6 Hare, 229; *Jones v. Bailey*, 17 Beav. 582. Even against the prior mortgagee's application for a sale. (*Messer v. Boyle*, 21 Beav. 559; *Beckett v. Buckley*, L. R. 17 Eq. 435.)

(*z*) *Rolleston v. Morton*, 1 Dru. & War. 195; *per* Lord St. LEONARDS.

(*a*) *Per* Sir G. J. TURNER, L.J., *Exp. Boyle, Re Boyle*, 3 De G. M. & G. at p. 530.

(*b*) *Ford v. Wastell*, 6 Hare, 229; *Jones v. Bailey*, 17 Beav. 582; *Messer v. Boyle*, 21 Beav. 559; *Beckett v. Buckley*, L. R. 17 Eq. 435.

(*c*) But see *Wells v. Kilpin*, L. R. 18 Eq. 298.

Paragraphs
1014—1015

Clearly
entitled to
sale.

1014. His remedy by sale has been facilitated by a statute, not extending to Ireland; which provides (*d*), that every creditor to whom any land of his debtor shall have actually been delivered in execution by virtue of any judgment, statute or recognizance (meaning such only as have been entered up since the passing of the Act (*e*)), shall be entitled forthwith, or at any time afterwards, while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, the petition being served upon the debtor only. And thereupon the court is to direct all such inquiries as to the nature and particulars of the debtor's interest in the land, and his title thereto, as shall appear necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court, with respect to sales of real estates of deceased persons for the payment of debts, shall be adopted and followed so far as the same may be found convenient and applicable.

If it shall appear on making such inquiries that any other debt due on any judgment, statute or recognizance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner), shall be served with notice of the order for sale, and shall, after such service, be bound thereby, and shall be at liberty to attend and have the benefit of the proceedings; and the proceeds of the sale shall be distributed among the persons found entitled thereto, according to their respective priorities (*f*).

Every person claiming any interest in the land through or under the debtor, by any means subsequent to the delivery of the land in execution, shall be bound by the order for sale and by the proceedings consequent thereon (*g*).

Meaning of
words
“delivered
in execution.”

1015. The words “delivered in execution” are not confined to an actual delivery by the sheriff, but include any act of lawful authority which is equivalent to such a delivery as can be made, having regard to the nature of the property. Therefore, in the case of an equitable interest, the words are satisfied by the appointment of a receiver or other order of the Chancery Division in favour of a judgment creditor seeking the removal of a legal obstacle to the execution of his judgment (*h*). And the judgment creditor may now, without going through the form of suing out an *elegit* (*i*),

(*d*) 27 & 28 Vict. c. 112, s. 4 (Judgment Law Amendment Act, 1864), as amended by 63 & 64 Vict. c. 26, s. 5.

(*e*) *Re Isle of Wight Ferry Co.*, 11 Jur. (N.S.) 279.

(*f*) 27 & 28 Vict. c. 112, s. 5.

(*g*) Section 6.

(*h*) *Hatton v. Haywood*, L. R. 9 Ch. 229; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; but cf. *Re Potts, Exp. Taylor*, [1893] 1 Q. B. 648.

(*i*) *Exp. Evans, Re Watkins*, 11 Ch. D. 691.

bring an action to assert his equitable right, and, on the removal of the impediment, may obtain a sale on petition under the Act (*k*); or may, without proceeding to redeem the prior incumbrances, have equitable execution by way of sale, and the appointment of a receiver without prejudice to prior incumbrancers (*l*).

Paragraphs
1015—1017

It has been said that the relief given is substantially a delivery in execution, whether in form it be a writ of assistance or sequestration, or the appointment of a receiver (*m*). And where a sequestrator was appointed of the estate of a defendant, who was in contempt for the non-payment of money to a creditor, an order for sale was made under the Act on the petition of the creditor and of the sequestrator (*n*). But where the sequestration was obtained on a contempt for non-payment of money into court, it was held that neither the plaintiff, the sequestrator, nor the court, was a creditor for the purpose of supporting a petition for sale (*o*).

1016. An order will not be made for the sale of that which is incapable of seizure—such as a remainder, of which the debtor cannot be seised or possessed within 1 & 2 Vict. c. 110 (*p*);—nor where it does not appear whether the debtor has any saleable interest, or what, if any, is the nature of his interest, without first ascertaining its nature by inquiry (*q*).

No order for sale of a reversionary interest.

1017. The order is *ex debito justitiæ*, and will not be prevented, in the case of land belonging to a public company, by the existence of arrangements under which the different classes of shareholders have different interests in the property (*r*). But where the property bound by the judgment consists of a railway or other public undertaking of the like nature, the court will not make an order for sale of the whole property because the public would lose the benefit of the undertaking (**174**); as, for the same reason, it denies foreclosure to the holders of debentures (being mortgages of the undertaking), and limits the remedy to the appointment of a receiver of the tolls and profits (*s*). But under the Judgment Law Amendment Act mentioned above, the court will order a sale of the superfluous lands of a company subject to the provisions of the Lands Clauses Consolidation Act (*t*); directing, in the first place, inquiries as to

Statutory right to sale of property seized in execution is absolute except where sale against public policy.

(*k*) *Re Cowbridge Railway Co.*, L. R. 5 Eq. 413.

(*l*) *Wells v. Kilpin*, L. R. 18 Eq. 298. It was held in this case that the judgment creditor was not entitled to a decree for foreclosure; but in *Beckett v. Buckley* (L. R. 17 Eq. 435) such a decree was made by HALL, V.-C.

(*m*) *Hatton v. Haywood*, *supra*, per Lord SELBORNE.

(*n*) *Re Rush*, L. R. 10 Eq. 442.

(*o*) *Johnson v. Burgess*, L. R. 15 Eq. 398.

(*p*) *Re Cowbridge Railway Co.*, L. R. 5 Eq. 413; *Re Duke of Newcastle*, L. R. 8 Eq. 700; *Re South*, L. R. 9 Ch. 369.

(*q*) *Re Bishops Waltham Rail. Co.*, L. R. 2 Ch. 382.

(*r*) *Re Ogilvie*, L. R. 7 Ch. 174.

(*s*) *Furness v. Caterham Rail. Co.*, 25 Beav. 615.

(*t*) 8 & 9 Vict. c. 18, ss. 127—131.

Paragraphs
1017—1018 the debt, the nature of the lands extended, the interest of the company in them, and the charges thereon (u). The proceeds will not go to debenture holders in priority to ordinary creditors under s. 4 of the Railway Companies Act, 1867 (x).

SECTION III.

Enforcing Liens by Sale.

	PARAGRAPH
<i>Vendor's lien on land</i>	1018
<i>Lien of consignee of West Indian Estate</i>	1019

Vendor's lien
on land.

1018. The lien of the unpaid vendor, and other liens upon real estate, are also enforceable by sale (y), when they have been established by the decree of a Court of Equity, binding the persons affected by the lien (z). And in the case of the vendor's lien, the produce of the sale after payment of the expenses of re-sale will be applied in discharge of the original purchase-money, with a right of proof against the estate of the vendee, if a bankrupt, for the deficiency. This right of sale may be enforced against land taken by a public company, even after the undertaking is in operation, notwithstanding the public interest; which, however it may be considered in cases arising between the company and its own creditors, cannot be set up as a ground for taking the property of a stranger without payment (a). And notwithstanding some cases to the contrary (b), it seems that the court will, upon the application of the vendor, in the meantime restrain the company from continuing in possession and using the land for the purposes for which he sold it to them, until payment of the purchase-money(c). Other equitable liens may commonly be enforced in the same manner; though a lien upon trust property cannot be so enforced where the effect would be to destroy the object of the trust (d).

(u) *Re Hull and Hornsea Rail. Co.*, L. R. 2 Eq. 262; *Gardner v. London, Chatham and Dover Rail. Co., Exp. Grissell*, L. R. 2 Ch. 385; followed and extended in *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169; and *Reeve v. Medway (Upper) Navigation Co.*, [1905] W. N. 75. Where the company did not show by any evidence that the lands were not surplus lands, sale was ordered without inquiry. (*Re Calne Rail. Co.*, L. R. 9 Eq. 658.)

(x) *Re Hull, Barnsley, and West Riding Junction Rail. Co.*, 40 Ch. D. 119.

(y) *Hope v. Booth*, 1 B. & Ad. 498.

(z) See *Att.-Gen. v. Sittingbourne and Sheerness Rail. Co.*, L. R. 1 Eq. 636.

(a) *Walker v. Ware, etc. Rail. Co.*, L. R. 1 Eq. 195; *Wing v. Tottenham, etc. Rail. Co.*, L. R. 3 Ch. 740; *Raper v. Crystal Palace Rail. Co.*, 16 W. R. 413; *Williams v. Great Eastern Rail. Co.*, 16 W. R. 821.

(b) *Pell v. Northampton and Banbury Junction Rail. Co.*, L. R. 2 Ch. 100; *Munns v. Isle of Wight Rail. Co.*, L. R. 5 Ch. 414; *Latimer v. Aylesbury and Buckingham Rail. Co.*, 9 Ch. D. 385; *Lycett v. Stafford, etc. Rail. Co.*, L. R. 13 Eq. 261.

(c) *Allgood v. Merrybent and Darlington Rail. Co.*, 33 Ch. D. 571.

(d) *Darke v. Williamson*, 25 Beav. 622.

1019. Amongst equitable liens enforceable by sale, may be noted particularly that of the consignee of a West India estate (525) which in one instance (*e*) seems to have been considered to be no more than a dormant lien, giving no actual right to a sale of the *corpus* of the estate. The authorities, however, show that in case of salvage, the creditor is entitled to be re-imbursed by sale, although that remedy did not arise out of his original security (*f*), and that the remedy also affects the consignee of West India estates; and where the lien affected a slave compensation fund, the fund was ordered to be paid to the consignee (*g*). The lien itself is founded upon the principle of salvage (*h*) (1259), the estate being kept in cultivation by the consignee's advances; as a leasehold estate is preserved from forfeiture by payment of the ground rent, and a ship and cargo by the last of several advances on bottomry. The lien will accordingly take precedence of all other incumbrances, including securities to the Crown (*i*).

Paragraphs
1019—1020

Lien of
consignee of
West Indian
estate.

SECTION IV."

Sales to enforce Bottomry Bonds and other
Maritime Securities.

	PARAGRAPH
General jurisdiction of admiralty division	1020
Sale to enforce bottomry bond when ordered	1021
Sales to enforce mortgages of ships	1022
Sales to realize lien for necessities	1023
Sale by court completes purchaser's title	1024

1020. The Admiralty Division of the High Court, in which the jurisdiction of the late Court of Admiralty is now vested (*k*), has power in all cases of bottomry, salvage, and claims for wages, to decree the sale of the ship against which the proceeding is carried on, unless the demands of the successful suitor are satisfied; and the title conferred by the court is recognized by the laws of this and of all other countries, and is valid against the whole world (*l*).

General
jurisdiction
of Admiralty
Division.

(*e*) See *Shaw v. Simpson*, 1 Y. & Coll. C. C. at p. 753.
(*f*) *Fetherstone v. Mitchell*, 11 Ir. Eq. R. 35; *Locke v. Evans*, 11 Ir. Eq. R. 52; *Hill v. Browne*, 6 Ir. Eq. R. 403.
(*g*) *Morrison v. Morrison*, 2 Sm. & G. 564, affirmed (*sub nom. Morison v. Morison*), 7 De G. M. & G. 214. And see *Re Tharp*, 2 Sm. & G. 578, n., where it was intimated that policies liable to the lien would be sold if necessary; and *Bertrand v. Davies*, 31 Beav. 429; *nom. Bernard v. Davies*, 32 L. J. Ch. 41. And see the decisions in the West Indian Incumbered Estates Court, *Re Harriott, Exp. Pengelley*, 8 L. T. (N.S.) 854; Cust's West Indian Incumbered Estates Acts, 271, ed. 2; *Re M'Dowall*, Cust's West Indian Incumbered Estates Acts, 300, ed. 2.
(*h*) *Per* Lord St. LEONARDS, *Re Tharp, supra*.
(*i*) *Re M'Dowall*, Cust's West Indian Incumbered Estates, 300, ed. 2.
(*k*) Judicature Act, 1873, s. 16, and see ss. 34, 42; Act of 1875, s. 11.
(*l*) *The Tremont*, 1 W. Rob. 163.

Paragraphs
1021—1024

Sales to
enforce
bottomry
bonds when
ordered.

1021. A sale is not decreed at the instance of a bottomry bondholder, until the court is satisfied by perusal of the bond that it is duly executed, and with maritime risk. But although the bond may be invalid at law, yet if it be apparently regular, and not opposed by the owners of the ship, freight, or cargo, the court will act upon it (*m*); and the holder having shown a *prima facie* title which would entitle him to payment out of the proceeds when brought into the registry, may require that any person who claims an interest shall prove it, before the bondholder is called upon to defend his own claim.

A sale obtained on proceedings founded upon a fraudulent bottomry bond is invalid and will be set aside (*n*).

Sales to
enforce
mortgages
of ships.

1022. The court also has jurisdiction over mortgages of ships under the Admiralty Court Act, 1861 (c. 10), and can make orders for sale (*o*) in proper cases; and, where necessary, can make a declaration of the title of a purchaser (*p*).

Sale to
realize lien
for neces-
saries.

1023. A ship under arrest for necessities may be ordered to be removed from a building-yard and to be appraised and sold, without prejudice to claims or liens upon the proceeds of sale, for rent or other charges, if it be shown by affidavit that the amount of the claim in the suit exceeds the present value of the ship, and that she is deteriorating (*q*).

Sale by court
completes
purchaser's
title.

1024. Upon the sale of a ship by order of the Court of Admiralty, for the satisfaction of bottomry or other claims, the title is complete without any delivery of the register. And no order will be made for its delivery, against the official agent of a foreign country, who alleges that he detains it under the law of his own country. But the court will order the delivery of the register in the case of a British vessel, because its production at the custom-house may be necessary (*r*).

(*m*) *The India*, 9 Jur. (N.S.) 417.

(*n*) *The Justyn*, 6 L. T. (N.S.) 553.

(*o*) Section 11; see *Cartwright v. Philpott (The Jeff-Davis)*, L. R. 2 P. C. 19.

(*p*) *The Rose*, L. R. 4 Ad. & E. 6; 3 & 4 Vict. c. 65, ss. 3, 4 (Admiralty Jurisdiction).

(*q*) *The Nordstjernen*, Swab. 260.

(*r*) *The Tremont*, 1 W. Rob. 163.

SECTION V.

Foreclosure or Sale by Bankruptcy Court.

	PARAGRAPH
<i>Questionable whether bankruptcy court has power to order foreclosure</i>	.. 1025
<i>Bankruptcy does not interfere with right to bring foreclosure action</i>	.. 1026
<i>Jurisdiction in bankruptcy to order sale at mortgagee's request</i>	.. 1027
<i>Similar rights given to unpaid vendors</i>	.. 1028
<i>No order for sale in bankruptcy where security is suspected</i>	.. 1029
<i>No order where great delay</i>	.. 1030
<i>In bankruptcy a sale may be ordered before debt is payable</i>	.. 1031
<i>Sale of mortgaged leaseholds in bankruptcy</i>	.. 1032
<i>Sale by court where there is express power in mortgage</i>	.. 1033
<i>Sale at request of sub-mortgagee</i>	.. 1034
<i>Sale where mortgage is equitable without deposit or memorandum</i>	.. 1035
<i>Cases where no order for sale will be made</i>	.. 1036
<i>Parties to be served with notice of application</i>	.. 1037
<i>Effect of mortgagee applying for a second sale where first is abortive</i>	.. 1038

1025. The question whether under the Bankruptcy Act, 1869, (ss. 65, 72), the Court of Bankruptcy could order foreclosure was expressly left open by the Court of Appeal; but the observations of the Lords Justices were unfavourable to the existence of the jurisdiction where the proceedings were *in invitum* (s). The jurisdiction of the London Court of Bankruptcy being now transferred to, and the court being part of, the High Court (t), it seems now to have the power of foreclosure in bankruptcy, if circumstances should make it desirable to exercise it. And although s. 102 of the Act of 1883 is framed in nearly the same words as s. 72 of the Act of 1869, the conclusion appears to be strengthened by the proviso that the jurisdiction given by the former shall not be exercised by the county court for the purpose of adjudicating upon any claim not arising out of the bankruptcy which might, theretofore, have been enforced by action in the High Court, unless all parties consent, or the right in dispute does not, in the opinion of the judge, exceed the sum of 200*l*.

1026. The trustee in a bankruptcy has the ordinary right to obtain foreclosure in the Chancery Division (u), and so has a mortgagee on the bankruptcy of the mortgagor (x), and the court will not, at the request of the trustee in the mortgagor's bankruptcy, transfer foreclosure proceedings to the Queen's Bench Division, to be tried before the bankruptcy judge (y). The same rule applies

(s) See *Exp. Fletcher, Re Hart*, 9 Ch. D. 381.
 (t) Bankruptcy Act, 1883, s. 93.
 (u) *Waddell v. Toleman*, 9 Ch. D. 212.
 (x) *Exp. Hirst*, 11 Ch. D. 278; *Waddell v. Toleman, supra*; *Exp. Pannell, Re England*, 6 Ch. D. 335.
 (y) *Re Champagne, Exp. Kemp*, [1893] W. N. 153.

Paragraphs
1026—1027

in the winding-up of companies (z). The mortgagee is, in fact, independent of the bankruptcy or winding-up proceedings, and his action is to enforce a claim, not against the bankrupt or the company, *but to his own property* (z).

Jurisdiction
in Bank-
ruptcy to
order sale at
mortgagee's
request.

1027. The Bankruptcy Rules of 1886 provide (a), that upon application by motion by any person claiming to be a mortgagee of, or to have security over, any part of the bankrupt's *real or leasehold* estate, and whether such mortgage or security shall be by any deed or otherwise, and whether the same shall be of a legal or equitable nature, the court will inquire whether such person is such mortgagee, and for what consideration, and under what circumstances; and if it shall be found that he is such mortgagee, and no sufficient objection shall appear to his title to the sum claimed by him, the court will direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon such mortgage, and of the rents, and profits, dividends, interest, or other proceeds received by such person, or by any other person, by his order or for his use, in case he shall have been in possession of the property over which the mortgage shall extend, or any part thereof; and the court, if satisfied that there ought to be a sale, will then direct notice to be given in such public papers as it shall think fit, when and where, and by whom, and in what way, the said premises or property or the interest therein so mortgaged, or over which the security shall so extend, are to be sold, and that such sale be made accordingly. The trustee (unless it be otherwise ordered) shall have the conduct of such sale; but the mortgagee may bid. It is not imperative on any mortgagee to make such application. All proper parties are to join in the conveyance to the purchaser (where necessary), as the court shall direct (b).

The moneys arising from the sale are to be applied, in the first place, in payment of the costs, charges and expenses of the trustee, of and occasioned by the application to the court, and of and attending such sale, and then in payment and satisfaction of what shall be found due to the mortgagee or person so having security, for principal, interest and costs (c); and the surplus if any will be paid to the trustee. But in case the moneys to arise from the sale shall be insufficient to pay and satisfy what shall be found due to the mortgagee, or person having security, then he shall be entitled to prove as a creditor for such deficiency; and receive dividends

(z) *Re David Lloyd & Co., Lloyd v. David Lloyd & Co.*, 6 Ch. D. 339; and see *Campbell v. Compagnie General de Bellegarde*, 2 Ch. D. 181.

(a) Rule 73.

(b) Rule 74.

(c) Including costs of defending the security; *Exp. Carr, Re Hofmann*, 11 Ch. D. 62.

thereon, rateably with the other creditors, but not so as to disturb any dividend or dividends already made (*d*). Paragraphs
1027—1031

For the better making such inquiry and taking such account, and making a title to the purchaser, all parties may be examined by the court upon interrogatories or otherwise as it shall think fit, and shall produce before the court, upon oath, all deeds, papers and writings in their respective custody or power, relating to the estate or effects of the bankrupt, as the court shall direct (*e*).

1028. The vendor of real estate who has not conveyed (*f*), and the vendor of personalty who retains the *indicia* of the property (*g*), have the same right as a mortgagee to an order for sale, and to prove for the deficiency; and without their consent there will be no sale of the estate on the application of a mortgagee of the bankrupt purchaser; nor even of the bankrupt's interest in the estate, until the vendor has been served with the petition (*h*). Similar rights
given to
unpaid
vendors.

1029. There will be no order for sale if the security be open to suspicion of any taint; as (formerly) of usury (*i*); or if it be for money which cannot properly be secured by mortgage (*k*); or if the lender having notice of a trust, lent the money to the trustee for his own purposes (*l*); or where the bankruptcy followed so close upon the deposit as to raise a presumption of fraudulent preference, unless it be rebutted by evidence (*m*). And in such cases, the court always requires satisfactory proof that the security was not made in contemplation of bankruptcy. But the application may be ordered to stand over pending an inquiry into the existence and circumstances attending the creation of the debt and deposit; and to enable the assignees to apply for a delivery of the deeds. No order for
sale in
bankruptcy
where
security is
suspected.

1030. An order for sale was also refused on account of the staleness of the demand, where twelve years had elapsed between the deposit and the application, the bankrupt being dead and there being no written evidence of the debt (*n*). No order
where great
delay.

1031. It is not a valid objection to the order for sale, that the period had not expired before which, under the terms of the mortgage, the debt could not be called in; because such a provision has reference to the mortgagee's remedies at the date of the security, In bank-
ruptcy a sale
may be
ordered
before debt
is payable.

(*d*) Rule 75.

(*e*) Rule 76.

(*f*) *Exp. Gyde*, 1 Gl. & J. 323; *Exp. Lord Seaforth*, 1 Rose, 306.

(*g*) *Exp. Sheppard*, 2 Mont. D. & De G. 431; *Exp. Twining*, 1 Mont. D. & De G. 691.

(*h*) *Exp. Wright, Re Watts*, 3 Mont. & A. 49.

(*i*) *Exp. Nunn*, 1 Deac. 393.

(*k*) *Exp. Wake, Re Clark*, 2 Deac. 352.

(*l*) *Exp. Turner*, 9 Mod. 418.

(*m*) *Exp. Wake, Re Clark*, 2 Deac. 352; *Exp. Ainsworth*, 2 Deac. 563; *Exp. Dewdney*, 4 Deac. & C. 181; *Exp. Morgan*, 1 Mont. D. & De G. 116; *Exp. Clouter*, 3 Mont. D. & De G. 187; but see *Exp. Heathcote*, 2 Mont. D. & De G. 711.

(*n*) *Exp. Jones, Re Oliver*, 3 Mont. & A. 327.

Paragraphs
1031—1035

when he had the responsibility of the bankrupt as well as of the estate to rely upon; and he cannot be deprived both of interest and of his right to sell (*o*).

Sale of
mortgaged
leaseholds in
bankruptcy.

1032. The right to a sale, in the case of leaseholds, is not affected by a lessee's covenant not to assign without the licence of the lessor (**463**); though it would be so if the lease were determinable on the committal of an act of bankruptcy (*p*). On an application for a sale of leaseholds, the mortgagee will not be ordered to indemnify the trustee against any breach of the covenants: he having had the option of rejecting the lease (*q*).

Sale by court
where there is
express power
in mortgage.

1033. The mortgagee may waive his special power of sale, and apply to the court for an order for sale in his general character of mortgagee (*r*).

Sale at
request
of sub-
mortgagee.

1034. If a mortgagee who has made a sub-mortgagee become bankrupt, the sub-mortgagee may obtain a sale of the bankrupt's interest in the original security (*s*); but not without a previous inquiry as to the amount due if the original security was for an uncertain sum; though leave will be given to enter a claim for the full amount due to the sub-mortgagee pending the inquiry. If after the sub-mortgage the original mortgagee have bought the equity of redemption, and the assignees reject it, the sub-mortgagee may include it in his sale, and the assignees will be bound to convey to the purchaser (*t*).

Sale where
mortgage is
equitable
without
deposit or
memoran-
dum.

1035. A deposit of deeds is not necessary to enable the equitable mortgagee to obtain an order for sale (*u*), nor is a memorandum of deposit; though in bankruptcy the absence of the latter affects his right to costs. But if the mortgagee have no memorandum, he must produce clear evidence in support of his debt, and his mere allegation will not be admitted against the affidavit of the bankrupt. Therefore, where the bankrupt denied by his affidavit that the security was for past as well as for present and future advances, the order for sale was prefaced by a declaration that the deposit was for present and future advances only, and the order reserved the proceeds after payment of such advances, and gave liberty to apply for the purpose of proving the mortgagee's allegation (*x*).

(*o*) *Exp. Bignold, Re Theobald*, 3 Mont. & A. 477.

(*p*) *Exp. Sherman*, Buck, 462; *Exp. Drake*, 1 Mont. D. & De G. 539; *Exp. Baglehole*, 1 Rose, 432.

(*q*) *Exp. Fletcher, Re Collins*, 1 Deac. & C. 318; see Bankruptcy Act, 1883, s. 55.

(*r*) *Exp. Hodgson, Re Cook*, 1 Gl. & J. 12; *Exp. Bacon*, 2 Deac. & C. 181; *Exp. Barnes*, 3 Deac. 223.

(*s*) *Exp. Mackay, Re Wright*, 1 Mont. D. & De G. 550; *Exp. Powell, Re Moore*, De G. 405.

(*t*) *Exp. Tuffnell, Re Watts*, 1 Mont. & A. 620.

(*u*) *Exp. Jones*, 4 Deac. & C. 750.

(*v*) *Exp. Martin*, 2 Mont. & A. 243.

If the deposit was made by the solicitor of the bankrupt, it must be shown that he had authority to make it (*y*). Paragraphs
1035—1036

Nor is the right to a sale affected either by an imperfection in the memorandum, or in the deposit, provided the intention to complete the security be shown. Freeholds and leaseholds have alike been ordered to be sold, where the deposit of the deeds relating to both was complete, but the memorandum related to one only (*z*); and where both were specified in the memorandum, but the deeds relating to one only were deposited (*a*) (35). Nor is it affected by an arrangement made subsequent to the security, between the mortgagor and a third person, under which the latter acquires an interest in the mortgaged property (*b*). And if an equitable mortgagee take a legal mortgage with notice of the bankruptcy, his right to a sale under the equitable mortgage is only suspended, and revives when the legal security is declared to be inoperative (*c*).

1036. But there can be no sale where the security is inoperative for want of compliance with some legal formality—as enrolment (*d*); nor where there can be no proof by the mortgagor for the deficiency,—as if the bankrupt be only a purchaser of the equity of redemption, whose covenant for repayment does not make him personally liable for the debt to the mortgagee (*e*) (1321); nor where the title to the mortgaged property is hampered,—as where it consisted of a share of partnership property subject to a right of pre-emption, and the taking of partnership accounts was necessary to ascertain its value (*f*); nor where it cannot be separately sold without injury,—as in the case of fixtures in a house which was not subject to the security (*g*); nor where the property was subject to other incumbrances belonging to persons not before the court, and the priorities and validity of which were disputed by the petitioner,—sales in such cases being disadvantageous to the bankrupt's estate. But in complicated cases the mortgagee may enter a claim for the whole amount of his debt, until the question of right is determined (*h*). And if part only of the property be the subject of litigated rights, the court will order sale of the other part, without prejudice to the right of the applicant

Cases where
no order for
sale will be
made.

(*y*) *Exp. Coleman*, 4 Deac. 242.

(*z*) *Exp. Robinson, Re Evans*, 1 Deac. & C. 119.

(*a*) *Exp. Leathes*, 3 Deac. & C. 112.

(*b*) *Exp. Booth*, 2 Deac. & C. 59.

(*c*) *Exp. Harvey, Re Emery*, 3 Deac. 547.

(*d*) *Exp. Miller, Re Swann*, 3 De G. & Sm. 553.

(*e*) *Exp. Keightley, Re Stockdale*, 3 De G. & Sm. 583.

(*f*) *Exp. Broadbent, Re Barrow*, 1 Mont. & A. 635; *Exp. Attwood*, 2 Mont. & A. 24.

(*g*) *Exp. Sykes*, 13 Jur. 486.

(*h*) *Exp. Bignold, Re Francis*, 1 Deac. 515.

Paragraphs 1036—1038 against the part in respect of which the order is refused (*i*). Sale may also be ordered of the separate estate of one partner mortgaged for a partnership debt, where he alone becomes bankrupt, though there will be no proof against his estate (*k*).

Parties to be served with notice of application.

1037. The mortgagee who applies for a sale must bring before the court all persons with whom deeds relating to the property have been deposited by the bankrupt (*l*). Where there are several incumbrancers, the concurrence of all is necessary, and if they do not concur the court can only sell subject to the rights of those who dissent (*m*).

Effect of mortgagee applying for a second sale where first is abortive.

1038. If the property be bought in by the trustee, the mortgagee, by applying for a second sale, waives all claims against the trustee for any difference in the amount of biddings between the first and second sales (*n*).

(*i*) *Exp. Wace*, 2 Mont. D. & De G. 730.

(*k*) *Exp. Lloyd*, 3 Mont. & A. 601.

(*l*) *Exp. Burt*, 1 Mont. D. & De G. 191.

(*m*) *Exp. Jackson*, 5 Ves. 357; *Exp. Wright, Re Watts*, 3 Mont. & A. 49.

(*n*) *Exp. Baldock*, 2 Deac. & C. 60.

CANADIAN NOTES

FORECLOSURE OR SALE

THE rights of mortgagor and mortgagee are reciprocal. If there is a right to foreclose there is a right to redeem, and *vice versâ* (a).

A mortgagee is usually entitled to foreclosure or sale at his option (b). See, however, *Excelsior Life Co. v. Prestniak*, *post*, 932m; and *Canada Life Assurance Co. v. Vance* (1909), 12 W. L. R. 231. The action may be brought in the County Court when the sum claimed does not exceed \$200 (c).

The Court will not order a sale of land over which it has not territorial jurisdiction (d), the court acting *in personam* (e).

When the sale of land is under an order of the Court an application to confirm sale of land in foreclosure proceedings was refused, as plaintiff's solicitor had neglected to inform defendant's solicitors of the day of the sale, as they promised they would do, and it was ordered that the property be readvertised and resold (f).

Section 31 of the Saskatchewan Interpretation Act declared mountain standard time to be the time for the province. Where lands were ordered to be sold at twelve o'clock noon and the sale was carried out on local time, one hour earlier than the standard time, the sale was held to be irregular (g).

Plaintiffs were proceeding with foreclosure proceedings when a subsequent incumbrancer procured an order nisi for a sale. At the sale the plaintiff's agent bought the property for 25 cents. On application for confirmation the mortgagor

(a) *Parker v. The Vine Growers' Association* (1876), 23 Gr. 179.

(b) *Meyers v. Harrison* (1850), 1 Gr. 449.

(c) R. S. O. (1897), c. 55, s. 23, sub-s. 11.

(d) *Strange v. Radford* (1887), 15 O. R. 145.

(e) *Henderson v. Bank of Hamilton* (1893), 20 O. A. R. 646; 23 S. C. R. 716.

(f) *Great West v. Lieb*, 11 W. L. R. 632; and see *Cummings v. Semerad*, *post*, 932o.

(g) *Great West Life v. Hill* (1909), 2 Sask. L. R. 158.

appeared to object, saying that plaintiffs had, before the sale, sold to another party. Confirmation of sale refused, and order made for foreclosure and a vesting order (*h*).

An order *nisi* for foreclosure may be changed into one for sale. Where first order had been contested and not appealed from it was held that the matter was not *res judicata* (*i*).

In *Grey v. Manitoba and North Western Rly.* (*k*), the Manitoba Court granted judgment for the sale of a mortgaged railway, part of which extended beyond the limit of Manitoba.

When the mortgage is in the form of a trust for sale, the Court will not direct foreclosure, but sale only (*l*).

The request for a sale from some of those named in Imperial Chancery Act, 15 & 16 Vict. c. 86, s. 48, is a condition precedent for making an order for sale instead of foreclosure. No such request having been made, order made for foreclosure although mortgagees' claim was \$1000 and the land was worth \$1850 (*m*).

An equitable mortgagee, by deposit of title deeds was held not entitled to a sale, although the sale might be directed at the request of a subsequent incumbrancer or the mortgagor (*n*).

A subsequent mortgagee cannot as plaintiff have a sale against a prior mortgagee. If a subsequent incumbrancer is brought into Court by a prior incumbrancer, he may obtain a sale on proper terms; but if a subsequent incumbrancer brings an action, and makes the prior incumbrancer a party thereto, the former is limited to his right to redeem the earlier mortgage (*o*).

A mortgagee of a railway is not entitled to either sale or foreclosure. He is only entitled to the appointment of a receiver or a manager of the undertaking (*p*).

When the equity of redemption is held by the Crown,

(*h*) *Canada Permanent v. Jesse*, 11 W. L. R. 295.

(*i*) *J. I. Case Co. v. Preston*, 12 W. L. R. 12.

(*k*) (1895), 31 C. L. J. 324.

(*l*) *Paton v. Mikes* (1860), 8 Gr. 252.

(*m*) *Canada Life v. Vance* (1909), 12 W. L. R. 231.

(*n*) *Kerr v. Beebee* (1866), 12 Gr. 204.

(*o*) *Campbell v. McDougall* (1880), 5 O. A. R. 503; *McDougall v. Campbell* (1887), 6 S. C. R. 502.

(*p*) *Galt v. Erie and Niagara Railway Co.* (1868), 14 Gr. 499; *Peto v. Welland Railway Co.* (1862), 9 Gr. 455.

the mortgagee may be allowed, in default of payment, to take possession until the Crown shall think proper to redeem (*q*).

Municipal Corporations are entitled to foreclosure (*r*). A chartered bank is also entitled to foreclosure (*s*).

Where infants were concerned, and it appeared that a sale would not realize the plaintiff's claim, foreclosure was decreed against the Master's order for sale (*t*).

In Manitoba it has been held that the Court has no power to make an order for sale after there has been an order for foreclosure except by the consent of all parties interested (*u*).

A mortgagee cannot after an order *nisi* for foreclosure and before it is made absolute exercise his power of sale without the leave of the Court (*x*).

The Court will not increase the amount of the deposit required under the rules when the defendant asks for a sale in lieu of a foreclosure, even though the costs exceed \$80 (*y*). The deposit may be dispensed with in the case of infant defendants (*z*).

If the costs of a sale are less than the deposit, the surplus will be applied towards the payment of a second mortgagee's claims (*a*).

In case the mortgagee has sold part of the mortgaged property under his power of sale, without the concurrence of the owner of the equity, the sale will not effect the mortgagee's right to bring an action for foreclosure or sale in respect of the remaining part (*b*).

(*q*) *Dunn v. Attorney-General* (1864), 10 Gr. 482.

(*r*) *Municipality of Oxford v. Bailey* (1866), 12 Gr. 276.

(*s*) *Bank of Upper Canada v. Scott* (1858), 6 Gr. 451.

(*t*) *Landed Banking and Loan Co. v. Anderson* (1886), 3 Man. R. 270; and see *Kennedy v. Foxwell*, *post*, p. 412i.

(*u*) *Credit Foncier Franco-Canadien v. Schultz* (1894), 14 C. L. J. 323; 10 Man. L. P. 158.

(*x*) *De Beck v. Canada Permanent Loan and Savings Company* (1906), 12 B. C. R.; 4 W. L. R. 91.

(*y*) *Cruso v. Close* (1879), 8 P. R. 33.

(*z*) *Bank of Upper Canada v. Scott* (1858), 6 Gr. 451; *Laurason v. Fitzgerald* (1862), 9 Gr. 371. See, however, *Western Canada Loan and Savings Co. v. Dunn* (1883), 9 P. R. 587.

(*a*) *Gzowski v. Beaty* (1879), 8 P. R. 146.

(*b*) *Gowland v. Garbutt* (1867), 13 Gr. 578; *Crawford v. Armour* (1867), 13 Gr. 576; *Munson v. Hauss* (1875), 22 Gr. 279.

Rule 389 provides that in an action for foreclosure the defendant may move to stay the proceedings in the action after judgment, but before final foreclosure, or recovery of possession of the mortgaged property, upon paying into Court the amount then due for principal, interest, and costs, and see *Hazeltine v. Consolidated Mines, Limited* (1909), 13 O. W. R. 994.

When a sale has been made under a judgment of the Court, special grounds must be shown before the Court will reopen the sale proceedings (*c*).

Plaintiff, a mortgagee, applied to set aside a sale made on his application under direction of the Court. Held, that purchase price was fair; that purchaser not at fault; but plaintiffs were in having the reserved price fixed too low. Application refused (*d*).

For terms upon which the reopening of the foreclosure may be had, see *Gillies v. Smith* (1909), 13 O. W. R. 1108.

In an action for foreclosure of a mortgage for \$12,000, defendant claimed that plaintiff had advanced only \$5000 in cash, and that there were no other considerations. Held, that as the mortgagee was given an interest in the property which was to be subdivided into lots, and that as his share of the profits was to be \$7000, there was nothing improper or inequitable in fixing the amount and including it in the mortgage. There had also been ratification (*e*).

After the order nisi for foreclosure the mortgagee paid certain taxes. Held, that accounts must be taken anew and a new day fixed (*f*).

The report of an abortive sale requires confirmation (*g*).

Action on covenant and for foreclosure on appeal from order of the referee, in an action for foreclosure and a personal order for payment, staying proceedings after judgment under Rule 278 of the King's Bench Act, R. S. M. (1902), c. 40, upon payment of the overdue instalment of principal, interest, and

(*c*) *Union Trust Co. v. O'Reilly* (1907), 10 O. W. R. 618.

(*d*) *Fox v. Hunter*, 12 W. L. R. 87; *Cumming's v. Semerad*, *post*, p. 932o.

(*e*) *Buckle v. Peaslee* (1909), 14 O. W. R. 37.

(*f*) *Mathew v. McLean*, 11 W. L. R. 630.

(*g*) *Roberts v. Caughall* (1903), 2 O. W. R. 939.

costs. Held, (1) that the action was one for foreclosure within the meaning of Rules 277 and 278 of the King's Bench Act, although judgment for the amount of the debt was also asked for. (2) A provision in a mortgage that, upon default in payment of an instalment of principal or interest, the whole should become due, is not one against which equity will relieve as being in the nature of a penalty: *Sterne v. Beck*, De G. J. & S. 595. (3) Although Rule 278 says that proceedings may be stayed in the action after judgment "upon paying into Court the amount then due for principal, interest, and costs," the relief ordered could not be granted to the defendant under that rule because, by virtue of the acceleration clause in the mortgage, the amount then due was the full amount of the principal debt, and equity will not relieve against such a provision. (4) The defendant was entitled to the relief ordered by s. 117 of the Real Property Act, which provides that a mortgagor, in the circumstances appearing in this case, may "pay such arrears as may be in default under the mortgage, together with costs, to be taxed by the district registrar, and he shall thereupon be relieved from the consequences of non-payment of so much of the mortgage money as may not then have become due, and payable by reason of lapse of time. (5) Section 117 of the Real Property Act, notwithstanding that it is preceded and followed by sections relating only to mortgages registered under the new system, is not so limited, but expressly applies to all mortgages, including those registered under the old system (*h*).

Lands under mortgage were offered for sale by the municipality for arrears of taxes, and purchased by the wife of the mortgagor. The tax sale certificate was afterwards assigned to L., who obtained a deed from the municipality. In an action against the mortgagor, his wife, and L., for foreclosure, the mortgagee alleged that the purchase at the tax sale was in pursuance of a fraudulent scheme by the mortgagors to obtain the land freed from the mortgage. Held, that L. could not claim to have been a purchaser for value without notice, as such offence was not pleaded, and it was not a case in which leave to amend should be granted. Held further, that the facts proved

were sufficient to put L. on inquiry, and so amounted to constructive notice (*i*).

A motion by the plaintiff in a mortgage action for an order for a new day, and a new account, and to change the relief sought from sale to foreclosure, was opposed by the defendant upon the ground of a settlement or compromise after judgment, under which money had been paid to the plaintiff, the mortgagee. Held, that if the defendant mortgagor had made default in payments according to the agreement, the unmodified burden of the mortgage existed, and was enforceable. Such an arrangement should be investigated in the Master's office and not by independent litigation. The matter had passed into judgment, and the only contest was as to how much was due and payable in respect of the mortgage, having regard to the arrangement manifested in the correspondence and dealings subsequent to the Master's report. It was foreign to the policy of the Judicature Act to contemplate new litigation in such a case as this (*k*).

An action for foreclosure and possession was begun by a mortgagee against the mortgagor and a tenant of the latter in possession. The tenant entered an appearance disputing the amount, and pending the action the mortgagor dispossessed her by other means. Judgment by default was obtained by the plaintiff against the mortgagor without taking any notice of the tenant. Held, that this was irregular, the action should have been dismissed or discontinued against her. Upon the reference directed by the judgment, and in his report the Master continued the tenant as a defendant by original action and also added her as a party in his office by serving her with a notice to incumbrancers, although she was not a subsequent incumbrancer. Held, that her name should be struck out both as an original and added party, upon her appeal from the report, notwithstanding that she had not moved to discharge the notice served upon her (*l*).

(*i*) *Lawlor v. Day* (1899), 29 S. C. R. 441; affirming 12 Manitoba L. R. 290, *sub nom.* *Day v. Rudledge*.

(*k*) *M^cCollum v. Caston et al* (1901), 1 O. L. R. 240.

(*l*) *Cowan v. Allen* (1896), 26 S. C. R. 292; followed *M^cLaughlan v. Stewart* (1901), 1 O. L. R. 295.

Execution creditors though they probably cannot sell under their writs the interest of their execution debtor in land subject to more than one mortgage made by him, are nevertheless incumbrancers upon that interest, and upon the proceeds thereof in the event of a sale of the land by a mortgagee, and entitled to payment thereon according to priority.

Held, following *Bocoy v. Spiller*, 6 Terr. L. R. 225 ; 2 W. L. R. 280, that the Court has jurisdiction in proceedings by way of originating summons to determine whether or not executions are binding on land against which they are registered. (2) That an execution creditor has no *locus standi* in an application for confirmation of a mortgage sale of a homestead declared exempt, and cannot take exception to the regularity of the sale proceedings (*m*).

A mortgagee who sells the land and pays off an incumbrancer who holds to his knowledge collateral security must take over that collateral security for the benefit of subsequent incumbrancers, including execution creditors, and is liable to them for value thereof if he fails to do so (*n*).

R.S.O. (1897), c. 121, s. 17, which allows overdue mortgage to be paid without notice and without extra witness, expressly states that it is not to apply to principal which becomes due by reason of default in payment of interest on instalments (*o*).

When a mortgagee upon default in payment of an instalment of interest brings a foreclosure action, and claims payment of the full amount secured by the mortgage, any party to the action by original writ, or added in the master's office, or by subsequent order, is entitled to hold him to his election and to pay his claims (*p*).

A person who, after the institution of the foreclosure action, acquires an interest in or claims against the mortgaged premises may on his application be added as a party (*q*).

(*m*) *Union Bank v. Jordon*, 8 W. L. R. 77, 1 Sask. 105.

(*n*) *Glover v. Southern Loan and Savings Co.* (1901), 1 O. L. R. 59.

(*o*) *Cruso v. Bond*, 1 O. R. 384. *McFadden v. Brandon*, 8 O. L. R. 610 ; 4 O. W. R. 349. *Mitchell v. Colonial Investment and Loan Co.* (1907), 9 O. W. R. 219.

(*p*) *Gibson v. Nelson*, 21 Occ. N. S. 35 ; 2 O. L. R. 500.

(*q*) *Gibson v. McLean* (1901), 2 O. L. R. 500.

The lessees of owner of equity of redemption with option of purchase ought to be made a party (*r*).

Mortgagees obtained the usual judgment against the mortgagor and his wife for redemption or foreclosure on the 5th April, 1900. The Master added as defendants a subsequent mortgagee and creditors of the mortgagor having a *fi. fa.* lands in the hands of the sheriff, and by his report, dated the 16th May, 1900, certified that the execution creditors had not proved any claim and appointed the 17th November, 1900, for payment by the subsequent mortgagee. Payment not having been made, a final order of foreclosure as to the added defendants was issued on the 21st November, 1900. The Master thereupon made a subsequent report, appointing the 29th December, 1900, as the day for payment by the original defendants, and payment not having been made by them, a final order of foreclosure was issued against them on the 29th January, 1901. On the 3rd of April, 1901, the execution creditors served a notice of motion to open the foreclosure. On the same day the mortgagees had written to the mortgagor offering to give them as of grace, a part of any surplus over their claim which they should realize by a sale of the mortgaged premises upon the mortgagor agreeing not to move to open the foreclosure. Held, that the execution creditors having moved with reasonable promptness, and being in a position to give the mortgagors immediate payment, were entitled to have the foreclosure set aside, and to be let in to redeem upon the usual terms (*s*).

A. advanced a sum of money to B., taking two mortgages on separate properties, each mortgage being for half the mortgage money. The mortgagee foreclosed one of the mortgages and then parted with the property. Held, that this was no bar to a foreclosure of the other mortgage (*t*).

A mortgagee who holds several mortgages on the same land, one of which is not due, cannot foreclose that mortgage with the others (*u*). If there are several mortgagees they must all

(*r*) *Elmsley v. Dingman* (1907), 10 O. W. R. 248.

(*s*) *Scottish American Investment Company v. Brewer* (1901), 2 O. L. R. 369.

(*t*) *Bald v. Thompson* (1869), 16 Gr. 177.

(*u*) *Thibods v. Collar* (1850), 1 Gr. 147.

be parties to the action whether they be joint tenants or tenants in common (*x*).

A Bill of foreclosure filed by the survivor of three joint trustee mortgagees who had no beneficial interest in property brought, and it is not necessary to add the representatives of the deceased trustees (*y*).

Under the Devolution of Estates Act (*z*), all property real and personal of a person dying on and after the first day of July, 1886, devolves upon and becomes vested in his legal personal representatives.

A married woman has, under the Married Woman's Property Act (*a*), the same remedies for the protection of her separate property as if she was a *feme sole*.

A lunatic having a committee must sue by them (*b*). If there is no committee then the lunatic must sue by his next friend (*c*). If the action proceeds without proper representatives of a lunatic it is void (*d*).

A married woman cannot fill the office of next friend (*e*).

When an assignment of a mortgage is not absolute but is by way of charge only the assignor is a necessary party, and he may bring an action in his own name (*f*).

The express notice to the debtor required by the Ontario Judicature Act (*g*) must be given to enable the assignee to bring his action (*h*).

A Sheriff may bring an action on a mortgage taken in execution in his own name (*i*).

All parties interested in the equity of redemption should be made original defendants in an action for foreclosure or

(*x*) R. S. O. (1897), c. 121, s. 13.

(*y*) *Landale v. McLaren* (1892), 8 Man. R. 322.

(*z*) R. S. O. (1897), c. 127, s. 4.

(*a*) R. S. O. (1897), c. 163, s. 15.

(*b*) R. S. O. (1897), c. 65, s. 8.

(*c*) *Skinner v. White* (1883), 19 C. L. J. 115.

(*d*) *Warnock v. Prieur* (1887), 12 P. R. 264.

(*e*) *Martin v. Martin* (1893), 15 P. R. 177.

(*f*) *Prittie v. Connecticut Fire Insurance Co.* (1896), 23 O. A. R. 449.

(*g*) R. S. O. (1897), c. 51.

(*h*) *M'Lean v. Chisholm* (1895), 27 N. S. R. 492.

(*i*) R. S. O. (1897), c. 77, s. 25.

sale (*k*). But execution creditors and persons having mechanic's liens subsequent to the plaintiff should be added in the Master's office and not made original parties (*l*).

In Ontario the Act respecting Assignments and Preferences by Insolvent Persons (*m*) vests in the assignee any equity of redemption belonging to the assignor.

The wife of a mortgagor who has barred her dower is a proper if not necessary party in the first instance (*n*).

The wife of a purchaser of the equity of redemption is not a proper party to an action of foreclosure (*o*).

An administrator *ad litem* may be appointed in actions for foreclosure or sale (*p*).

When the mortgaged lands were not equal in value to the mortgage debt and the mortgagee sought foreclosure only, the mortgagor having left us other estate to which resort could be had, an administrator *ad litem* was appointed (*q*). If a mortgagor dies intestate his infant children are proper parties to an action for foreclosure or sale (*r*).

A railway company taking lands by arbitration are proper parties to an action for foreclosure (*s*).

A surety for payment of a mortgage is not a proper party to a foreclosure suit (*t*).

When a purchaser of the equity of redemption covenants with the mortgagor to pay off the mortgage the debt cannot be sued by the mortgagee for want of priority (*u*).

(*k*) *Patterson v. Holland* (1860), 8 Gr. 238; *Buckley v. Wilson* (1861), 8 Gr. 566.

(*l*) *Jackson v. Hammond* (1879), 8 P. R. 157; *Nelson v. Cochrane* (1889), 13 P. R. 76.

(*m*) R. S. O. (1897), c. 147, s. 5.

(*n*) *Ayerst v. McLean* (1890), 14 P. R. 15; *Blong Fitzgerald* (1893), 15 P. R. 467.

(*o*) *Parker v. Willett* (1899), 22 N. S. R. 83; *Monk v. Benjamin* (1890), 13 P. R. 356; Dower Act, R. S. O. (1897), c. 164, s. 2.

(*p*) *Re Chambliss and Canada Life Assurance Company* (1888), 12 P. R. 694.

(*q*) *Cameron v. Phillips* (1889), 13 P. R. 78; *Re Williams and McKinnon* (1891), 14 P. R. 338.

(*r*) *Keen v. Codd* (1891), 14 P. R. 182; and see *Emerson v. Humphries* (1892), 15 P. R. 84.

(*s*) *Scottish American Investment Co. v. Prittie* (1893), 20 O. A. R. 398.

(*t*) *Real Estate Loan Co. v. Molesworth* (1886), 3 Man. R. 116.

(*u*) *Clarkson v. Scott* (1878), 25 Gr. 373; *The Frontenac Loan and Investment*

The mortgagee cannot require a surety to pay until the security has been realized and a deficit ascertained (*x*).

When the mortgaged lands have been sold to several persons the purchasers, however numerous, must be made parties to the action. The mortgagor is entitled to insist that the whole of the mortgaged estate shall be redeemed together (*y*).

When a lease is made by the mortgagee subsequent to the mortgage the lessee is a proper party to the action (*z*).

Registered subsequent mortgagees or the personal representatives should be added as parties in the Master's office (*a*).

When it is shown that there are unregistered liens or charges the holders of such liens or charges should be made parties in the Master's office (*b*). But a simple contract creditor who has not recovered judgment is not a proper party (*c*).

Persons acquiring interest *pendente lite* need not be added as parties, and are notwithstanding bound by the proceedings (*d*).

A mortgagee has a right to begin an action for foreclosure the day after default (*e*).

If the defendant does not appear to the writ the plaintiff cannot extend his claim in the statement of claim beyond what was claimed in the endorsement on the writ unless it is an extension merely of what was claimed in the writ (*f*).

If it is alleged that the mortgage is invalid the question should be raised by the pleadings, not in the Master's office (*g*).

In a foreclosure action the only defence was by W., a second mortgagee. It was held that the defendant W. would

Co. v. Hysop (1892), 21 O. R. 577; *Canada Landed and National Investment Co. v. Shaver* (1895), 22 O. A. R. 377.

(*x*) *Tutor v. St. John* (1863), 10 Gr. 85.

(*y*) *Buckley v. Wilson* (1861), 8 Gr. 566.

(*z*) *Martin v. Miles* (1883), 5 O. R. 404; *Anderson v. Stevenson* (1888), 15 O. R. 563; *Collins v. Cunningham*, *Cunningham v. Drysdale* (1892), 21 S. C. R. at p. 149.

(*a*) R. S. O. (1897), c. 121, s. 11; c. 127, ss. 3 and 4.

(*b*) *Canadian Bank of Commerce v. Forbes* (1885), 10 P. R. 442.

(*c*) *Nichol v. Allenby* (1889), 17 O. R. 275.

(*d*) *Robson v. Argue* (1878), 25 Gr. 407.

(*e*) *Bennett v. Foreman* (1868), 15 Gr. 117; *Lamb v. McCormack* (1857), 6 Gr. 240.

(*f*) *Smythe v. Martin* (1898), 18 P. R. 227.

(*g*) *Bickford v. Grand Junction Railway Co.* (1877), 1 S. C. R. 696; *McDougall v. Lindsay Paper Mills Co.* (1884), 10 P. R. 247; 20 C. L. J. 133; *Re*

not be permitted to amend the defence after the judge had decided against him. If he had a defence upon the merits, it should have been pleaded with the points of law. O. 13, r. 12 (j) affords all the protection such a defendant can demand (h).

If the statute of limitations is relied upon as a defence it must be expressly pleaded (i).

In an action for foreclosure or sale or possession of mortgaged property the defendant may before judgment move to dismiss the action upon paying into Court the amount then due under the mortgage and costs (k).

After an order for sale had been made and a deficiency resulted, the Court allowed the mortgagee to proceed for the deficiency against the mortgagor on the latter covenant (l).

The following cases may also be consulted with reference to foreclosure: *J. I. Case Company v. Preston* (1910), 12 W. L. R. 12; *Canada Life v. Vance* (1910), 12 W. L. R. 231; *Williams v. Box* (1910), 13 W. L. R. 451; *Independent Lumber Company v. Gardiner* (1910), 13 W. L. R. 548; *Mitchell v. Rutherford*, 12 W. L. R. 55.

RIGHTS OF EXECUTION CREDITORS

Of Mortgagee

THE estate, right, title, and interest of a mortgagee under a registered mortgage of land may be seized under a writ of execution against the mortgagee, Execution Act (a). In Nova Scotia the interest of a mortgagee under a mortgage is bound by a recorded judgment, and may be sold thereunder (b). In New

Munsie (1884), 20 C. L. J. 112; *Wiley v. Ledyard* (1883), 10 P. R. 182; 20 C. L. J. 142; *Rowland v. Burwell* (1888), 12 P. R. 607.

(h) *Ritchie v. Pyke*, 1904, 40 N. S. R. 476.

(i) *Wright v. Morgan*, 1 O. A. R. 613; *Cattanaoh v. Urquhart* (1873), 6 P. R. 28.

(k) See *Wilson v. Campbell* (1893), 15 P. R. 254; *Robertson v. Hetherington* (1888), 8 C. L. T. 141; *Strachan v. Murney* (1858), 6 Gr. 378; *Cruso v. Bond* (1881), 9 P. R. 111; 1 O. R. 384.

(l) *McNeil v. O'Connor* (1907), 2 E. L. R. 288. See *Union Bank of Canada v. McElroy* (1909), 11 W. L. R. 259, as to procedure by originating summons for order for foreclosure.

(a) R. S. O. (1897), c. 77.

(b) *Nova Scotia Mining Co. v. Greener* (1898), 31 N. S. R. 189.

Brunswick the estate of a mortgagee in fee, who has not taken possession of the land, is not seizable in execution on a judgment against him (*c*). And where money due on any security on real estate is collected by a sheriff he may give a discharge under his hand and seal duly acknowledged, which, when registered, shall operate as a discharge of such security. In Manitoba a mortgage may be seized and sold under an execution against the mortgage and the purchaser will acquire the interest of the mortgage therein (*d*). In the North West Territories a mortgage may be seized under a writ of execution and assigned by the sheriff to the creditor at the sum actually due thereon, or the sheriff may collect the amount due from the mortgagor (*e*).

Of Mortgagor

In *Imperial Elevator Company v. Jesse* (1907), 6 W. L. R. 381, and *post*, p. 669*c*, the question arose as to rights between the execution creditors and a second mortgagor. The execution had been registered prior to the second mortgage, but the Court held, following *Boez v. Spiller*, 2 W. L. R. 280, that the execution creditors had no claim as against the second mortgagee.

A judgment creditor of a mortgagor having a writ of execution against lands in the hands of the sheriff of the county in which the lands lie may, under the Execution Act (*f*), have all the interest of the mortgagor in the mortgaged lands seized and sold to satisfy his debt. The equity of redemption in a freehold mortgage of real estate may be sold subject to the mortgage under an execution against lands of the owner of the equity, either in his lifetime or after his death, in the same manner as lands not subject to mortgage may be sold. (In Nova Scotia the sale of the interest of a mortgagor of real estate is regulated by R. S. N. S. (1884), c. 124, which is similar in terms to the Ontario Act. In Manitoba by R. S. Man. (1902), c. 91. In New Brunswick R. S. N. B. (1877), c. 42 & 47.) It was held that a valid

(*c*) *Doe d. Vernon v. White* (1859), 4 All. (New Bruns.) 314.

(*d*) R. S. Man. (1902), c. 58, s. 13.

(*e*) Consolidated Ordinances, North West Territories (1898), c. 21, s. 359.

(*f*) R. S. O. (1897), c. 77.

sale could not be made where there were two mortgages held by different persons upon the same property (*g*). This decision, however, was questioned in a latter case (*h*). But the equity of redemption in a portion of the lands and the fee in another portion may be sold together under a writ against lands (*i*). If a sheriff seizes the equity and conveys to the execution creditor, the execution debt is satisfied *pro tanto*, and the equitable interest in the mortgaged premises becomes vested in the judgment creditor (*j*). A mortgagee purchasing, even if he is the holder of the judgment under which the sale takes place, must give to the mortgagor a release of the mortgage debt (*k*). Where a writ of execution after renewal was lost in transmission to the sheriff through the mail, an order was made for the issue of a new writ *nunc pro tunc*, to bear the same indorsements and evidence of renewal as the original writ ; the order further directing that the substituted writ should have the same force and effect as the original (*l*). A sale of equity of the redemption under an execution against the mortgagor will not be set aside in the absence of fraud or irregularity, merely on the ground of the inadequacy of the price obtained (*m*). Execution creditors of the mortgagor are "assigns," and are entitled to notice of sale under a power of sale the terms of which require notice to be given to the assigns of the mortgagor ; but only those having executions in the sheriff's hands at the time notice of default is given are entitled to notice (*n*). The right of an execution creditor under an execution against lands in the hands of the sheriff of the county in which the lands of the debtor are situated is a "lien" and the money mentioned in the writ is "money charged upon land." Taking steps to sell under such a writ is a "proceeding," and if the writ, although only renewed, has been more than ten years in the sheriff's hands,

(*g*) *Donovan v. Bacon* (1869), 16 Gr. 482; *note* ; *Wood v. Wood* (1869),*16 Gr. 471.

(*h*) *Samis v. Ireland* (1879), 4 Ont. App. 118.

(*i*) *Samis v. Ireland* (1879), 4 Ont. App. 118.

(*j*) *Chittick v. Lowery* (1903), 2 O. W. R. 957.

(*k*) R. S. O. (1897), c. 77, s. 32 ; *Samis v. Ireland* (1879), 4 Ont. App. 118.

(*l*) *Fairchild v. Crawford* (1896), 11 Man. R. 330.

(*m*) *Parr v. Montgomery* (1880), 27 Gr. 521.

(*n*) *Re Abbott and Medcalf* (1891), 20 Ont. 299.

and no payment or acknowledgment has in the meantime been made or given, as required by s. 23 of the Real Property Limitation Act (*o*), the lien is gone and proceedings on the writ will be restrained (*p*).

A third mortgage upon real estate made by a judgment debtor is not a transfer of property exigible under execution within the meaning of rule 903, and the third mortgagee is not therefore liable to be examined as a person to whom such a transfer has been made (*q*).

(*o*) R. S. O. (1897), c. 133.

(*p*) *Neil v. Almond* (1897), 29 Ont. 63; see also *Price v. Wade* (1891), 14 P. R. 351.

(*q*) *Canadian Mining and Investment Co. v. Wheeler* (1901), 3 O. L. R. 210, and see *Glover v. Southern Loan and Savings Company*, *ante*, p. 502*i*.

CHAPTER XI.

Of the Creditor's Right to prove in Bankruptcy Administration and Winding-Up.

	PARAGRAPH	Paragraph
<i>Remedies of secured creditors against the estate are prescribed by Bankruptcy Act</i>	1039	1039
<i>Mortgagee can only prove in bankruptcy on condition of valuing his security and proving for balance</i>	1040	
<i>Bankruptcy rules relating to proofs by secured creditors</i>	1041	
<i>Proving for interest</i>	1042	
<i>No proof for future premiums on mortgaged policy</i>	1043	
<i>Effect of foreclosing trustee as against puisne incumbrancers</i>	1044	
<i>Bankruptcy rules now apply to administration of estates of deceased insolvents and winding-up of companies</i>	1045	
<i>What is meant by "secured creditor"</i>	1046	
<i>Security given up enures for general body of creditors and not for puisne incumbrancers</i>	1047	
<i>Bankruptcy rules only apply to securities on debtor's own property</i>	1048	
<i>Application to case of joint debtors and joint or several securities</i>	1049	
<i>Cannot prove on promissory note given for arrears of interest</i>	1050	
<i>Proving for debt without disclosing security</i>	1051	
<i>Mortgagee cannot retract after electing if it would affect other creditors</i>	1052	
<i>When security consists of bills, etc.</i>	1053	
<i>Election to give up security does not release security</i>	1054	
<i>Method of proving for secured annuity</i>	1055	
<i>Mortgagee who votes in respect of his whole debt impliedly surrenders his security</i>	1056	

1039. The Bankruptcy Act, 1883, provides, s. 9, that after the making of a receiving order no creditor, except as directed by the Act, shall have any remedy in respect of any debt provable in the bankruptcy, against the property or person of the bankrupt, or shall commence any action, or other legal proceedings, unless with the leave of the court, and on such terms as the court may impose; but saves the power of any secured creditor to realize or otherwise deal with his security, in the same manner as, but for the above provisions, he would have been entitled to realize or deal with the same.

Remedies of secured creditors against the estate are prescribed by Bankruptcy Act.

This provision enables a mortgagee who does not choose to come in under the bankruptcy to use his ordinary remedies for enforcing his security (a).

(a) *White v. Simmons*, L. R. 6 Ch. 555, under corresponding section (12) of Act of 1869.

Paragraphs
1040—1041

Mortgagee
can only
prove in
bankruptcy
on condition
of valuing
his security
and proving
for balance.

Bankruptcy
rules relating
to proofs by
secured
creditors.

1040. If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated, as if he were an unsecured creditor.

1041. The rules as to proof by secured creditors under the Bankruptcy Act, 1883, s. 39, and Schedule 2, the non-compliance with which by a secured creditor excludes him from all share in any dividend (*b*), are as follows:—

9. If a secured creditor realizes his security he may prove for the balance due to him after deducting the net amount realized.
10. If he surrenders his security for the general benefit of the creditors he may prove for his whole debt (*c*).
11. If he does not either realize or surrender it, he shall, before ranking for dividend, state in his proof the particulars and date of his security, and the value at which he assesses it, and shall be entitled to a dividend only in respect of the balance after deducting the value assessed (*d*).
- 12.—(*a*.) The trustee may at any time (*e*) redeem the valued security on payment to the creditor of the assessed value.
 - (*b*.) If the trustee is dissatisfied with the assessed value, he may require the property valued to be offered for sale at such times and on such terms and conditions as may be agreed upon between him and the creditor, or as in default of agreement the court may direct. If the sale be by auction, the creditor, or the trustee on behalf of the estate, may bid or purchase.
 - (*c*.) But the creditor may at any time (*f*), by notice in writing, require the trustee to elect whether he will or not exercise his power of redeeming the security

(*b*) Rule 16.

(*c*) But if he does so, he cannot afterwards change his mind and rely on his security. *Re O'D, Exp. Robinson*, 15 L. R. Ir. 496.

(*d*) This applies even where the security was given for bills of exchange which have been negotiated by the creditor, and which he has had to pay in full. *Baines v. Wright*, 15 Q. B. D. 102, aff. 16 Q. B. D. 330. The estimate need not be the true estimate, but the trustee will be entitled to redeem at the amount estimated. *Exp. Taylor, Re Lacey*, 13 Q. B. D. 128. If a mortgagee has postponed his security to enable the debtor to raise more money, he will be entitled to prove for the amount which he would have received out of the security if he had not consented to postpone it. *Exp. Ford, Re Chappell*, 55 L. J. Q. B. 406.

(*e*) Before foreclosure. *Knowles v. Dibbs*, 60 L. T. 291.

(*f*) Without prejudice to his right to commence a foreclosure suit. *Knowles v. Dibbs, supra*.

or require it to be realized (*g*); and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his desire to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property vested in the trustee, shall vest in the creditor, whose debt shall be reduced by the amount at which the security has been valued. Paragraphs
1041—1042

13. Where a creditor has so valued his security, he may, at any time (*h*), amend the valuation and proof, on showing to the satisfaction of the trustee or the court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the court shall order, unless the trustee shall allow the amendment without application to the court (*i*).
14. Where a valuation has been so amended, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation, or shall be entitled to be paid out of any money for the time being available for dividend, any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation before that money is made applicable to the payment of any future dividend; but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.
15. If a creditor after having valued his security subsequently realizes it, or if it is realized under Rule 12, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor (*k*).
17. Subject to the provisions of Rule 12, a creditor shall in no case receive more than 20s. in the pound, and interest as provided by the Act (*l*).

1042. No interest can be proved for which accrues after the date of the receiving order (*m*); but interest accrued before that date Proving for
interest.

(*g*) For this purpose he may lump all his securities together. *Exp. Logan*, 72 L. T. 362.

(*h*) *Semble*, before redemption or election to redeem by the trustee. *Exp. Norris, Re Sadler*, 17 Q. B. D. 728.

(*i*) The amendment will be allowed in a proper case, notwithstanding the opposition of a subsequent mortgagee. *Re Arden, Exp. Arden*, 14 Q. B. D. 121; *Baines v. Wright*, 15 Q. B. D. 102; *aff.* 16 Q. B. D. 330.

(*k*) But the excess is applicable to the mortgagee's general costs. *Re Johnston*, 23 L. R. Ir. 50; *cf. Société Générale de Paris v. Geen*, 8 App. Cas. 606, under Act of 1869.

(*l*) See rule 20.

(*m*) *Re Bonacino*, 10 R. 147.

Paragraphs
1042—1045

may be the subject of proof. However, s. 23 of the Bankruptcy Act, 1890, (which can be excluded by a debtor with the consent of his creditors and the court (*n*)) provides, that where a debt proved against the estate includes interest, such interest shall, for the purposes of dividend, be calculated at a rate not exceeding five per cent. But this does not prevent a secured creditor who has realized or assessed his security, from allocating such value in discharge of interest at a higher rate than five per cent., and proving for the principal or balance of principal due to him (*o*). But he is not entitled to apply the proceeds of the security first in payment of interest *subsequent to the bankruptcy* and then in reduction of principal. He can, in fact, only prove for the balance due to him for principal and interest at the date of the receiving order, after deducting the amount received on realizing the security. He is, however, entitled to set-off profit realized since the receiving order, against interest accrued during the same period (*p*).

No proof for
future
premiums on
mortgaged
policy.

1043. It has been held by the House of Lords that under the Irish Bankruptcy Acts, a creditor having a security on a policy of assurance, cannot prove on the covenant to pay the premium after valuing his security and proving for the unsecured balance (*q*). There seems to be no difference in this respect between the Irish and the English Law (*r*).

Effect of
foreclosing
trustee as
against *puisne*
incum-
brancers.

1044. If a mortgagee forecloses the trustee in bankruptcy of the mortgagor, and also *puisne* incumbrancers, the order ought to show that the trustee was entitled to redeem at the valuation, but the *puisne* incumbrancers only at the full figure (*s*).

Bankruptcy
rules now
apply to
administra-
tion of
estates of
deceased
insolvents,
and winding
up of
companies.

1045. In the administration of the estates of deceased persons by the Court of Chancery, and in the winding-up of companies under the Companies Acts, the rule formerly was that the mortgagee might prove for his whole debt, and also make what he could of his security, not receiving more than 20s. in the pound, and the debt of the secured creditor was taken as it stood when the claim was sent in, although the security might have been partly realized

(*n*) *Re Nepean, Exp. Ramchand*, [1903] 1 K. B. 794.

(*o*) *Re Fox and Jacobs*, [1894] 1 Q. B. 438.

(*p*) *Re London, Windsor, and Greenwich Hotels Co.*, [1892] 1 Ch. 639; and see also *Re Savin*, L. R. 7 Ch. 760; and see *Exp. Ramsbottom*, 2 Mont. & A. 79; and *Ross v. Ross*, 25 L. R. Ir. 362.

(*q*) *Deering v. Bank of Ireland*, 12 App. Cas. 20.

(*r*) See judgment of Lord WATSON at p. 26, which he bases on the absurdity of a creditor being permitted to prove the balance of his debt against the general assets, and to receive dividends for that balance on the footing that it is unsecured and at the same time to claim the right to draw from the general assets a sum which he can only claim as equivalent for the security which he has lost through the bankrupt's failure to perform his personal covenant.

(*s*) *Knowles v. Dibbs*, 60 L. T. 291.

before adjudication (*t*). But in the administration by the court of the assets of any person who may die after November 1st, 1875, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, the assets of which may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt (*u*). The object of this enactment was to substitute for the former practice in equity, the rule of bankruptcy under which a creditor can only prove for the balance of his debt after deducting the value of his security. It does not affect the rights of a secured creditor to the benefit of any securities which he might have had, either in the administration of assets or in the winding-up of companies, irrespective of the rules of bankruptcy (*x*).

1046. A secured creditor is defined in the Bankruptcy Act, 1883, s. 168, as a person holding a mortgage, charge, or lien (*y*) on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor. And under the corresponding provision of the Bankruptcy Act, 1869, s. 16 (5), a garnishee order (whether made absolute, or whether an order nisi only had been obtained and served before the bankruptcy of the judgment debtor, or before he had presented a petition for liquidation), was held to be a charge which made the holder of it a secured creditor (*z*), although a garnishee order does not amount to an assignment (*a*). But the appointment of a receiver by way of equitable execution does not render the creditor a secured creditor for the purposes of the Bankruptcy Act (*b*). Nor does service of a writ of foreign attachment

Paragraphs
1045—1046

What is
meant by
"secured
creditor."

(*t*) *Mason v. Bogg*, 2 Myl. & Cr. 443; *Kellock's Case*, L. R. 3 Ch. 769; and see *Re Burned's Banking Co., Forwood's claim*, L. R. 5 Ch. 18; *Banner v. Johnston*, L. R. 5 H. L. 157; and other cases.

(*u*) Judicature Act, 1875, c. 77, s. 10. Companies Consolidation Act, 1908, see 207. As to the mode of working out the rights of the parties under the rules in bankruptcy, see *Re Hopkins, Williams v. Hopkins*, 18 Ch. D. 370.

(*x*) *Re Withernsea Brickworks*, 16 Ch. D. 337; *Re Maggi, Winehouse v. Winehouse*, 20 Ch. D. 545.

(*y*) See *Re Perkins, Exp. Mexican, etc. Mining Co.*, 24 Q. B. D. 613. A judgment for specific performance does not create a debt for which there is a vendor's "lien" within the meaning of the Act. (*Exp. Clarke, Re Burr*, [1892] W. N. 138.)

(*z*) *Emanuel v. Bridger*, L. R. 9 Q. B. 286; *Lowe v. Blakemore*, L. R. 10 Q. B. 485; *Stevens v. Phelps*, L. R. 10 Ch. 417. Per MELLISH, L.J., *Exp. Joselyne, Re Watt*, 8 Ch. D. 327. As to the construction of the word "lien," under the Act of 1849, see *Holmes v. Tutton*, 5 El. & Bl. 65; *Tilbury v. Brown*, 6 Jur. (N.S.) 1151; and see *Murray v. Arnold*, 9 Jur. (N.S.) 461.

(*a*) *Norton v. Yates*, [1906] 1 K. B. 112; *Cairney v. Back*, [1906] 2 K. B. 746.

(*b*) *Re Potts, Exp. Taylor*, [1893] 1 Q. B. 648; *Exp. Charrington, Re Dickinson*, 22 Q. B. D. 187.

Paragraphs 1046—1048 in an action in the Lord Mayor's Court, or in the Tolzey Court at Bristol, the process being only to compel appearance, though it purports to attach the goods of the defendants (*c*). And a landlord's right of distress was held not to be a mortgage charge or lien within the Act (*d*).

The term "secured creditor" in the 10th section of the Judicature Act, 1875, is also not limited to persons who hold securities by contract, but includes execution creditors (*e*). But the execution must be completed (both in bankruptcy cases and administration cases) by sale or receipt of the amount of the levy before the sheriff has been in possession for twenty-one days; otherwise, by virtue of s. 45 of the Bankruptcy Act, 1883, and s. 1 of the Bankruptcy Act, 1890, the execution will be void (*f*).

Security given up enures for general body of creditors, and not for *pui*ne incumbrancers.

Bankruptcy rules only apply to securities on debtor's own property.

1047. The security, which is given up (*g*), or redeemed by the trustee (*h*), enures for the general benefit of the creditors, and no advantage can accrue to later incumbrancers by reason of the discharge of the property from the prior security (*g*).

1048. The rule which requires the creditor to elect is considered (*i*) to be a technical rule of bankruptcy, and will not be extended beyond its strict limits. The principle upon which it is founded is, that all creditors should participate equally, and that one ought not to retain part of the estate, and at the same time to prove in competition with the others. But it is obvious that this can only be applied when the security is on the estate of the bankrupt himself, and that where it is on the estate of another person, who is only a surety for the debt, no injury is done to the other creditors by allowing the mortgagee to retain his security (*k*). In such cases the proper course (having regard to the equity of the surety) is for the creditor to prove first for his whole debt against the estate of the bankrupt debtor, and then to come upon the security for the deficiency; for it seems that if the pledge be first sold, and the surety have paid nothing before the bankruptcy, he has no remedy in respect of his loss (*l*).

This exception to the rule as to election is so well established,

(*c*) *Levy v. Lovell*, 11 Ch. D. 220; *Exp. Sear, Re Price*, 17 Ch. D. 74; and see *Richter v. Laxton*, 48 L. J. Q. B. 184.

(*d*) *Re Coal Consumers Association*, 4 Ch. D. 625.

(*e*) *Re Printing, etc. Registering Co.*, 8 Ch. D. 535.

(*f*) *Figg v. Moore Brothers*, [1894] 2 Q. B. 690; *Burns-Burns' Trustee v. Brown*, [1895] 1 Q. B. 324; and see as to equitable execution by the appointment of a receiver, *Exp. Charrington, Re Dickinson*, 22 Q. B. D. 187.

(*g*) *Cracknall v. Janson*, 6 Ch. D. 735.

(*h*) *Bell v. Sunderland Building Society*, 24 Ch. D. 618.

(*i*) *Per TURNER, L.J.*, in *Exp. Thornton*, 3 De G. & J. 454.

(*k*) *Exp. Goodman*, 3 Mad. 373; *Exp. Hedderly*, 2 Mont. D. & De G. 487; *Exp. Brett, Re Howe*, L. R. 6 Ch. 838; *Exp. National Provincial Bank, Re Sass*, [1896] 2 Q. B. 12.

(*l*) *Kittier v. Raynes*, 1 Cox. 105.

that it has been said (*m*) to be almost a maxim in bankruptcy, that a security is never to go in reduction of proof, unless it belongs to the estate against which the proof is tendered. Of the numerous cases in which it is applicable, a simple one is that in which the wife's estate is mortgaged to secure the debt of the husband; or where one partner mortgages his separate estate to secure a debt due from the other (*n*).

Paragraphs
1048—1049

1049. And where several persons are jointly indebted to a creditor, who holds a security on the separate property of one of the debtors, though he who has given the security be jointly liable with his co-debtors, yet the separate estate is only surety for the joint estate, and the mortgagee may therefore prove against the latter and also retain his security (*o*).

Applications
to cases of
joint debtors,
and joint or
several
securities.

The exception has also been extended to the case of a joint security, on a joint estate, to secure a joint debt, and a joint and several covenant for payment, so as to enable the mortgagee on the bankruptcy of the firm to prove against the separate estate of each partner, without giving up the joint security; because the subject of the security was not part of the estate against which the proof was made (*p*). But where the liquidating debtor being tenant in common with another, each has given a security upon his share of the property, the value of the security upon the debtor's share must be deducted, the security not being joint (*q*).

And again, where father and son executed a joint and several bond to a creditor, and the father mortgaged as further security his real estate, which on his death descended to any son, who became bankrupt; it was considered that, apart from the other question, the descent of the mortgaged estate would have brought the case within the general rule; and that though the pledge was not made by the bankrupt, and the property was not his when it was pledged, the mortgage could have been retained.

But as the other debts of the father, exclusive of the mortgage debt, would have exhausted the estate, so that no beneficial interest passed to the son, the mortgage was allowed to be retained (*r*). The assumption as to the effect of the descent of the estate appears, however, to be in conflict with a decision in a case in which a joint creditor having taken an equitable mortgage from one of his two debtors as security for the joint debt, and the mortgagor, having devised the estate to the other debtor, who became bankrupt, it

(*m*) *Per* Sir G. ROSE, *Exp. Adams*, 3 Mont. & A. 157; *Exp. Parr*, 1 Rose, 76.

(*n*) *Exp. Hedderly*, 2 Mont. D. & De G. 487; *Exp. Rodgers, Re Parkin*, 1 Deac. & C. 38; *Exp. Caldicott, Re Hart*, 25 Ch. D. 716.

(*o*) *Exp. Peacock*, 2 Gl. & J. 27; *Exp. Adams*, 3 Mont. & A. 157.

(*p*) *Exp. Shepherd*, 2 Mont. D. & De G. 204; *S. C. nom. Re Plummer*, 1 Ph. 56; *Rolfe v. Flower*, L. R. 1 P. C. 27; see *Exp. Davenport*, 1 Mont. D. & De G. 313; *Exp. English and American Bank, Re Fraser Trenholm & Co.*, L. R. 4 Ch. 49.

(*q*) *Exp. West Riding Union Banking Co., Re Turner*, 19 Ch. D. 105.

(*r*) *Exp. Turney, Re Taylor*, 3 Mont. D. & De G. 576.

Paragraphs was held that the creditor might both prove and retain; because,
 1049—1050 though the mortgaged property was vested in the bankrupt, he obtained it by the act of another person, and subject to the prior claims of the petitioner (s).

The result is the same where the proof and security relate to a debt contracted without the authority of him who is entitled to recover it; as where a partner in a bank drew out part of a balance standing to the account of the trustees of a will without their authority, and invested it on an unauthorized security. On the bankruptcy of the bankers, it was held that the *cestuis que trust* might prove for the whole balance without giving up the security; both because the security was not part of the bankrupt's estate, and because the persons interested in the trust estate, had a right to pursue and make the most of it without relinquishing the liability of the original debtors (t).

It must however be noted, that though the creditor have a security for a joint debt upon the separate estate of one of the joint debtors, yet if there be no creation of a separate debt, he can only prove against the joint estate (u). And if the debt be joint and several, the creditor must elect between the joint and separate estates; and electing to prove against the joint estate, he has no preference over other joint creditors against the surplus of the separate estate over the separate debts (x).

The exception from the rule against retainer, and full proof, does not apply where it is only in appearance that the security belongs to a separate estate; and therefore was not admitted where the joint debt was secured by shares in a company, which, though joint property, were standing in the separate names of the joint debtors, in compliance with a rule of the company that no shares should be held jointly (y). Nor where real estate bought with joint funds is used jointly, and mortgaged to secure a joint debt, can it be contended that because the conveyance was made to the partners as tenants in common, there was for the purpose of this exception to the general rule, a security upon the separate estate of each tenant in common (z).

Cannot prove
 on promissory
 note, given
 for arrears
 of interest.

1050. The general rule also prevents the creditor from retaining his security, and at the same time proving on a note, part of the consideration for which was interest on a debt covered by the security (a).

(s) *Exp. Bowden*, 1 Deac. & C. 135.

(t) *Exp. Biddulph*, 3 De G. & Sm. 587.

(u) *Exp. Leicestershire Banking Co.*, De G. 292; *Exp. Lloyd*, 3 Mont. & A. 601; *Exp. Biddulph*, *supra*.

(x) *Exp. Bevan*, 10 Ves. 107.

(y) *Exp. Connell*, 3 Deac. 201; *Re Collie*, *Exp. Manchester and County Bank*, 3 Ch. D. 481; see *Re Cooksey*, *Exp. Portal & Co.*, 83 L. T. 435.

(z) *Exp. Free*, 2 G. & J. 250.

(a) *Exp. Clark* 1 Mont. D. & De G. 622.

1051. It was held under the Act of 1869, that the proving of the debt without disclosing the security, was an election to abandon it, and not a ground for expunging the proof (*b*).

Paragraphs
1051—1052

Proving for debt without disclosing security.

1052. If the mortgagee elects to give up his security, and to prove, he cannot—after the sale of the estate by the trustee, or after doing acts by which he may have influenced the other creditors, such as receiving dividends, signing the bankrupt's certificate, or the like—retract his proof, and obtain the benefit of the security, even if the proof were made by mistake, and he offer to return any dividend which he may have received (*c*). But if under a mistake as to the value of his security he neither assesses its value, nor makes any claim in the winding-up, he may be allowed to prove for his unsecured balance on the terms of not disturbing any past dividend (*d*). And if his proof is rejected on the ground that less is due to him than the valuation, he is no longer bound by the valuation, but is remitted to all his rights as mortgagee (*e*).

Mortgagee cannot retract after electing, if it would affect other creditors.

The mortgagee has been refused permission to abandon his order for sale, with liberty to prove for the deficiency, and to prove for the whole debt, though the order had not been acted on, and he had obtained it in ignorance of his right (*f*); and he will not, after valuing a separate with a joint security, and proving for and receiving a composition, and more than the valuation of the security, be allowed, after the proceedings are at an end, to retain the separate security, on the ground that he need not have deducted it, or to amend the proof (*g*), nor after proving and voting for a composition, to set up a security afterwards, acquired by seizure under an execution (*h*); though mere silence at a first meeting of creditors will not prevent him from levying execution before the registration of a resolution accepting the composition (*i*). Nor after electing to treat the property as of a certain value can he be allowed to prove for a greater deficiency than was shown by the valuation (*k*) (**1041**). And the court has refused to create a precedent for conditional withdrawal of proof while a motion to expunge the proof was pending (*l*).

(*b*) *Exp. Rolfe*, 3 Mont. & A. 306. See Act of 1883 (**1041**).

(*c*) *Exp. Downes*, 18 Ves. 290; *Exp. Solomon*, 1 Gl. & J. 25; *Exp. Eggington*, Mont. 72.

(*d*) *Re Kit Hill Tunnel, Exp. Williams*, 16 Ch. D. 590; and see *Exp. Bagshaw, Re Ker*, 13 Ch. D. 304; *Exp. Good, Re Lee*, 14 Ch. D. 82.

(*e*) *Re Hopkins, Williams v. Hopkins*, (1883) W. N. 53.

(*f*) *Exp. Davenport*, 1 Mont. D. & De G. 313; and see *Exp. Reynal, Re Gye*, 2 Mont. D. & De G. 637; though it was intimated by the Court of Exchequer, that if proof were made in ignorance of the existence of the security, the Court of Bankruptcy would probably give relief. (*Grugeon v. Gerrard*, 4 Y. & C. 119.)

(*g*) *Couldery v. Bartrum*, 19 Ch. D. 394.

(*h*) *Re Balbirnie, Exp. Jameson*, 3 Ch. D. 488.

(*i*) *Exp. McLaren, Re McColla*, 16 Ch. D. 534.

(*k*) *Re Hopkins, Williams v. Hopkins*, 18 Ch. D. 370.

(*l*) *Re Clark, Exp. Buenos Ayres and Pacific Rail. Co.*, [1901] 1 Q. B. 655.

Paragraphs
1052—1056

But if part of the debt have been realized by sale under a decree, and the remainder of the estate be unsaleable, the mortgagee may prove on his bond for the deficiency, upon giving up the remaining benefit of the decree (*m*). So it seems he may come in and prove if the security fail before the estate is distributed (*n*). And a creditor who has a mortgage for a principal sum, and a further charge secured by the same and other securities, may retain the mortgage for the original debt, and prove for the other debts, upon giving up all the other securities (*o*).

Where
security
consists of
bills, etc.

1053. Where the creditor holds for his debt, bills of exchange deposited with the debtor by a third person, and of greater value than the amount of the debt due to himself, the creditor may prove and receive dividends in the bankruptcy of the parties liable on the bills on the full value of those securities, till he has received his own debt in full, whether the bills be given for value or for the accommodation of the drawer (*p*).

Election to
give up
security does
not release
surety.

1054. A surety is considered to contract with reference to the provisions of the Bankruptcy Act, and he is therefore not discharged from his liability by the exercise by the secured creditor, of the option given him by the Act to abandon his security and prove for the whole debt (*q*).

Where a surety applies for the sale of property mortgaged to him, as an indemnity against the debt which he has guaranteed, the proceeds of the sale will not be applied either in payment of the creditor, or for the indemnity of the surety, until so much of the creditor's proof as is equal to the amount of the proceeds has been expunged (*r*).

Method of
proving for
secured
annuity.

1055. When the security for an annuity is sold, the expenses are first paid, then the arrears due at the date of the bankruptcy are paid (the subsequent arrears not being provable), then the value of the annuity as ascertained in the bankruptcy, and the deficiency will be the subject of proof (*s*).

Mortgagee
who votes in
respect of his
whole debt
impliedly
surrenders
his security.

1056. A secured creditor for the purpose of voting is deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security. And, if he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence (*t*).

(*m*) *Exp. Wyly*, Vern. & Scriv. 518; *Exp. Greaves*, De G. 119.

(*n*) *Exp. Peake, Re Brodie*, L. R. 2 Ch. 453, *per* TURNER, L.J.

(*o*) *Re Allison*, Fonbl. 26.

(*p*) *Exp. Crossley*, 3 Bro. C. C. 237; *Exp. Bloxham*, 6 Ves. 449, 600; *Exp. Newton, Exp. Griffen*, 16 Ch. D. 330.

(*q*) *Rainbow v. Juggins*, 5 Q. B. D. 138, 422.

(*r*) *Exp. Sherrington*, 1 Mont. D. & De G. 195.

(*s*) *Exp. Slack*, 1 G. & J. 346; *Exp. Key, Re Kernot*, 1 Mad. 426.

(*t*) Bankruptcy Act, 1883, Sched. 1 (10); General Rules, 1870, ss. 99, 100, 101, 272.

PART V.

OF THE PRIORITIES OF INCUMBRANCERS.

CHAPTER	PARAGRAPH
I.—OF THE GENERAL DOCTRINES OF EQUITY RELATING TO PRIORITY AMONG INCUMBRANCERS	1057—1060
II.—OF THE NATURE OF NOTICE OF PRIOR INCUMBRANCES :	
SECTION I.—Actual and constructive notice ..	1061—1068
„ II.—Constructive notice through agents ..	1069—1081
„ III.—Constructive notice through knowledge of particular facts or instruments which ought to have led to inquiry or inspection	1082—1106
„ IV.—Constructive notice by tenancy.. ..	1107—1108
„ V.—Constructive notice of records	1109—1120
III.—OF PRIORITY CONFERRED BY POSSESSION OF THE LEGAL ESTATE :	
SECTION I.—Protection afforded by the legal estate generally and herein of defective assur- ances	1121—1132
„ II.—Tacking of securities as against mesne incumbrancers	1133—1159
„ III.—Tacking as against the mortgagor himself and persons claiming through him other than mesne incumbrancers ..	1160—1167
IV.—OF PRIORITY APART FROM THE POSSESSION OF THE LEGAL ESTATES :	
SECTION I.—The general rules relating to priority between mere equitable incum- brancers.. .. .	1168—1183
„ II.—The effect upon priority between mere equitable incumbrancers of fraud or negligence	1184—1199
„ III.—The effect upon priority between mere equitable incumbrancers of possession of title deeds	1200—1209
„ IV.—The priority in equity given by the right to consolidate securities	1210—1225

V.—OF SPECIAL RULES APPLYING TO PRIORITY UNDER
SECURITIES UPON CHATTELS PERSONAL AND CHOSSES
IN ACTION, AND UPON SHIPS UNDER THE MARITIME
LAW :

SECTION I.—Of priority in securities upon chattels personal and choses in action : and herein of the necessity of giving notice to trustees and others	1226—1258
„ II.—Of priority under the maritime law ..	1259—1265

VI.—OF PRIORITY BY STATUTE :

SECTION I.—Under the Land Registration Acts ..	1266—1282
„ II.—Under the Bills of Sale Acts	1283
„ III.—Under the Policies of Assurance Act ..	1284—1285
„ IV.—Under the Ship Registry Acts	1286—1290
„ V.—Under the Judgment Acts	1291—1311
„ VI.—Under the Bankruptcy and other Acts	1312—1317

CHAPTER I.

Of the General Doctrines of Equity relating to Priority among Incumbrancers.

	PARAGRAPH
Prima facie incumbrancers rank in order of date	1057
Where one advances money without notice of prior incumbrances the possession of legal estate or negligence or fraud of prior incumbrancer may give priority	1058
Defence of purchaser for value without notice is obsolete	1059
Division of the subject of priority	1060

1057. *Primâ facie*, all incumbrancers rank in order of date; those earliest in date taking priority of subsequent ones. The governing maxim is, *qui prior in tempore potior in jure est*; and where each *puisne* incumbrancer has notice (express or implied) of the prior incumbrance or incumbrancers, this rule is absolute.

1058. Where, however, a person advances money on the security of property without such notice, contending equities arise between him and the prior incumbrancers. If he has got the legal estate, or its equivalent, the maxim "where the equities are equal the law prevails" will give him priority over securities prior in date to his, but merely equitable in their nature. If, on the other hand, his security is merely equitable, the rule that first in date is first in law, although *primâ facie* applicable, is subject to modification where the prior mortgagees (being equitable only) have, by negligence, or (being either legal or equitable) have by fraud, enabled, or assisted, the debtor to conceal their securities from the *puisne* incumbrancer. Moreover, in certain localities, or with regard to certain securities, the rule as to priority is modified by statute.

1059. It is apprehended that the doctrines of equity, in relation to giving no assistance, by discovery or by ordering the delivery up of title deeds, as against a *bonâ fide* purchaser for value (a) without notice of prior incumbrancers, are now obsolete; the effect of the Judicature Acts having been to abolish the auxiliary jurisdiction of the Court of Chancery, and to make the High Court a

(a) See *Bassett v. Nosworthy*, 2 W. & T. Lead. Cas. 7th ed., p. 150, and notes thereto.

Paragraphs
1059—1060

court both of law and equity (*b*). The defence of “purchase for value without notice” never applied to the concurrent jurisdiction of the Court of Chancery (*b*), and the entire jurisdiction is now concurrent, the doctrines of equity prevailing where they conflict with the doctrines of law. It is, therefore, considered that, in all cases, the Chancery Division of the High Court will give relief to persons according to their priorities, and will not refuse its active aid against a purchaser for value without notice of an incumbrance prior to his own.

Division of
the subject of
priority.

1060. It is proposed in this part of this work to consider, first, what constitutes notice of prior incumbrances, so as to postpone a creditor with such notice who advances money on mortgage of the legal estate (and *à fortiori* on the equitable estate or interest); secondly, the protection afforded by the legal estate in the absence of such notice; and thirdly, the question of priority as between mere equitable incumbrancers, in the absence of such notice. It will also be convenient to consider separately the priority of mortgages of chattels personal, and choses in action, and ships and other maritime securities; and finally a chapter will be devoted to the several cases in which the ordinary law of priority has been modified by statute.

(*b*) *Ind, Coope & Co. v. Emmerson*, 12 App. Cas. 300.

CHAPTER II.

Of the Nature of Notice of Prior Incumbrances.

	PARAGRAPH
Section I.—Actual and Constructive Notice	1061—1068
„ II.—Constructive Notice through Agents	1069—1081
„ III.—Constructive Notice through knowledge of particular facts or instruments which ought to have led to inquiry or inspection	1082—1106
„ IV.—Constructive Notice by Tenancy	1107—1108
„ V.—Constructive Notice of Records	1109—1120

SECTION I.

Actual and Constructive Notice.

<i>Notice express or constructive</i>	1061
<i>Constructive notice</i>	1062
<i>Gross negligence may amount to constructive notice</i>	1063
<i>Ways in which constructive notice may arise</i>	1064
<i>Constructive notice limited by Conveyancing Act, 1882</i>	1065
<i>Actual notice</i>	1066
<i>Notice operates even in sales or mortgages by the court</i>	1067
<i>Notice sufficient if obtained before completion of transaction</i>	1068

1061. Notice is either express or implied: the one kind being a question of fact, the other arising from construction of law (a). Notice express or constructive.

1062. Implied, or constructive notice, has been defined to be the knowledge which the courts impute to a person, upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must exist, or have been communicated (b). Constructive notice.

It extends to matters affecting the title to property, and to circumstances which would entitle persons to equitable priorities, or change the character of rights depending upon want of notice; but not to such as merely relate to the motives and object of the parties, or to the consideration upon which the matter in hand is founded (c).

It is a presumption adopted for the prevention of fraud, and

(a) Co. Litt. 309 b.

(b) *Hewitt v. Loosemore*, 9 Hare. 449; *Plumbe v. Fluit*, 2 Anst. 432.

(c) *Per Lord CHELMSFORD* in *Eyre v. Burmester*, 10 H. L. C. 114.

Paragraphs does not necessarily agree with, but is often contrary to, the probabilities of the particular case, and may be raised in opposition to direct proof that no notice really existed (*d*) in such cases of fraud, as wilful blindness to facts, and neglect to make inquiries.

1062—1065

A person who is proved to have known facts, from which a court, or jury, or an impartial person would properly draw a certain inference will, therefore, not be allowed to escape from notice by saying that he did not draw the natural inference from the facts (*e*).

Gross negligence may amount to constructive notice.

1063. In cases of constructive notice the difficulty is usually less when there is actual fraud, than when it is to be determined whether the presumption of knowledge arises by reason of negligence so gross as to amount in the view of equity to evidence of fraud; or whether it fails because the person sought to be charged has shown only want of prudence or caution.

Ways in which constructive notice may arise.

1064. Constructive notice may be imputed to a person—

- (1.) By reason of the relation in which he stands towards another who has notice of certain facts, or instruments; and this notice is imputed to a principal by reason of the knowledge of his agent, on a presumption (without which any man might commit a fraud by means of his agent) that the latter communicates to his principal whatever knowledge he has in the matter, that is necessary for the safety of his principal that he should know.
- (2.) By reason of the knowledge possessed by the person sought to be affected, or which would have been possessed by him but for his or his agent's gross negligence of particular instruments, or facts, which, if followed up, would lead to the knowledge imputed; because it is the presumption of law that a purchaser has investigated the title of the property which he purchases, and has examined whatever forms a link in that title (*f*).
- (3.) By reason of the presumed publicity of general Acts of Parliament, and, in certain cases, of judicial proceedings.

The first and second of these kinds of notice, in which also neglect to communicate, or to make proper inquiry after the facts in question, may amount to actual fraud, or to negligence, which, in equity, is evidence of fraud, have been the subject of an enactment, which it will now be necessary to consider.

Constructive notice limited by Conveyancing Act, 1882.

1065. The Conveyancing Act, 1882 (c. 39), s. 3 (1), provides, that a purchaser (which includes a mortgagee) (*g*) shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—

(*d*) See *Earl of Portsmouth v. Lord Effingham*, 1 Ves. Sen. at p. 435.

(*e*) *Exp. Snowball, Re Douglas*, L. R. 7 Ch. 534.

(*f*) *Jones v. Smith*, 1 Hare, 43; *West v. Reid*, 2 Hare, 249; *Butler v. Earl Portarlington*, 1 Dru. & War. 20; *Berwick & Co. v. Price*, [1905] 1 Ch. 632.

(*g*) See interpretation clause of Act, and as to the general law, *Willoughby v. Willoughby*, 1 T. R. 763.

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him (*h*); or

Paragraphs
1065—1066

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made (*i*) by the solicitor, or other agent.

(2.) The section does not exempt a purchaser from any liability under, or any obligation to perform or observe any covenant, condition, provision or restriction, contained in any instrument under which his title is derived mediately or immediately; and such liability, or obligation, may be enforced in the same manner, and to the same extent as if the section had not been enacted.

(3.) A purchaser shall not, by reason of anything in the section, be affected by notice in any case where he would not have been so affected if the section had not been enacted.

(4.) The section applies to purchases made either before or after the commencement of the Act, save that where an action is pending at the commencement of the Act (December 31st, 1882), the rights of the parties shall not be affected by it.

The provisions being of a negative character, the third sub-section appears to be unnecessary. The object of the first is to get rid of some of those extensions of the law of notice which have gradually arisen out of the somewhat refined reasonings of the courts of equity, and which operated with much harshness. But in applying the Act it will often be as necessary as before to consider what constitutes "knowledge," either in the person to be affected by notice, or in his agent, "as such," when agency exists; whether the knowledge has been acquired in the same transaction; and what inquiries and inspections "ought reasonably to have been made." Upon that and some other points it will be attempted to throw light by referring to decisions upon the law of notice as it existed before the passing of the Act.

1066. Knowledge, in the first place, may be taken to imply, Actual and to be equivalent to, what is commonly known as actual notice. Actual notice.

Actual notice may be verbal as well as written (*j*), and may be effected as well by the delivery of a document which shows the

(*h*) *Berwick & Co., supra.*

(*i*) *I.e.*, ought to have been made as a matter of prudence, having regard to what is usually done by prudent men of business in similar circumstances. *Bailey v. Barnes*, [1894] 1 Ch. 25; *Berwick & Co. v. Price, supra.*

(*j*) *Browne v. Savage*, 4 Drew. 635; *North British Insurance Co. v. Hallett*, 7 Jur. (N.S.) 1263.

Paragraphs
1066—1067

nature and extent of the claim, as by one in the actual form of a notice (*k*). It is not necessary that it should have been given for the purpose of making a transaction valid. If it be actually given the object for which it was given is not material (*l*).

But the notice must be distinct; if written notice have not been given, evidence of casual conversations, not *ad rem*, will not alone be sufficient. It must be shown that such an intelligent apprehension of the fact has been acquired as would induce a reasonable man or an ordinary man of business to act upon the information, and to regulate his conduct by it in the matter (*m*). And there must be clear evidence of notice (*n*), for suspicious circumstances make no notice. It seems, also, that it ought to be given by a person interested in the property (*o*); but probably a notice would be held good if given even by a self-constituted agent, provided it be in behalf of an interested person, and provided the particulars of the claim be clearly set forth. These conditions are no doubt essential, for “flying reports,” says Lord Keeper *Egerton* (*p*), “are many times fables and not truth.” General reputation of a person’s insanity in the neighbourhood of his residence is, therefore, no notice of such person’s insanity, if actual notice be denied (*q*).

Notice
operates even
in sales or
mortgages by
the court.

1067. Before 1882, notice operated in a transaction under the direction of the court, just as in any other case (*r*); for the court did not warrant the validity of titles, but only employed its officer to investigate them.

Whether, however, the old rule still applies is not clear; for by s. 70 of the Conveyancing and Law of Property Act, 1881, “an order of the Court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction or of want of any concurrence, consent, notice or service, *whether the purchaser has notice of any such want or not.*” It has been held that this section does not render an order binding on any estate or interest which, having regard to the terms and scope of the order was not intended to be bound. It does not enable the court to sell and give a title to the property of A. when it supposed that it was selling the property of B. (*s*). It seems to follow that

(*k*) *Baillie v. M’Kewan*, 35 Beav. 177.

(*l*) *Smith v. Smith*, 2 Cr. & M. 231; *Rickards v. Gledstanes*, 8 Jur. (N.S.) 455, aff. 31 L. J. Ch. 142.

(*m*) *Ford v. White*, 16 Beav. 120; *Edwards v. Martin*, L. R. 1 Eq. 121; *Lloyd v. Banks*, L. R. 3 Ch. 488; *Saffron Walden, etc. Building Society v. Rayner*, 14 Ch. D. 406.

(*n*) *Whitfield v. Fausset*, 1 Ves. Sen. 387; *Hine v. Dodd*, 2 Atk. 275; *M’Queen v. Farquhar*, 11 Ves. 467; *West v. Reid*, 2 Hare, 249.

(*o*) Sugd. V. & P. 755, ed. 14.

(*p*) *Gouldsbrough*, 147, pl. 67. Mr. Coventry (Pow. Mort. 561 a, C. ed. 6) cites *Butcher v. Stapley* (1 Vern. 363) to the same effect; but it does not appear whether the neighbour’s “discourse” was held to be notice or not.

(*q*) *Greenlade v. Dare*, 20 Beav. 284.

(*r*) *Toulmin v. Steere*, 3 Mer. 210; dist. *Re Cork Harbour Docks Co.*, 17 L. R. Ir. 515, and in *Re Howard’s Estate*, 29 L. R. Ir. 266.

(*s*) *Jones v. Barnett*, [1900] 1 Ch. 370.

such an order would not protect a purchaser against an incumbrance, of which he had notice, if the court had no notice of it, and there was nothing in the order suggesting that the incumbrancer was intended to be bound. It is also considered that it only protects completed transactions, and would not be available by a purchaser or mortgagee with regard to anything to be done in the future in cases where there has been fraud, although the purchaser or mortgagee had no notice of it (*t*). On the other hand, where the court purports to bind a third party by the order a purchaser or mortgagee will be protected even although the order be on the face of it *ultra vires* (*u*).

Paragraphs
1067—1068

1068. It is material to the effect of notice where the object is to preserve priority, that it be given before the completion of the transaction. It will be good if given before the execution of the deed although the money have been already paid; because the payment and execution are but parts of the same transaction (*x*). Similarly, it will be good before payment, though security have been given for the consideration money (*y*); for perhaps after notice it will not be paid.

Notice
sufficient if
obtained
before com-
pletion of
transaction.

If a cheque be delivered and countermanded, notice before withdrawal of the countermand will bind the purchaser (*z*).

In the case of the bankruptcy of the assignor, the notice if given before the bankruptcy petition will be good; though the act of bankruptcy had, without the knowledge of the assignee when he gave the notice, been previously committed (*a*).

(*t*) See *Eyre v. Burmester*, 10 H. L. C. 90; *Heath v. Crealock*, L. R. 10 Ch. 22; and *cf. Pilcher v. Rawlins*, L. R. 7 Ch. 259.

(*u*) *Re Hall-Dare's Contract*, 21 Ch. D. 41; *Mostyn v. Mostyn*, [1893] 3 Ch. 376.

(*x*) *Wigg v. Wigg*, 1 Atk. 384.

(*y*) *Hardingham v. Nicholls*, 3 Atk. 304.

(*z*) *Tildesley v. Lodge*, 3 Sm. & G. 543.

(*a*) *Re Styau*, 1 Ph. 105; *Exp. Heslop*, 1 De G. M. & G. 477.

Paragraphs
1069—1070

SECTION II.

Constructive Notice through Agents.

	PARAGRAPH
<i>Notice to agent is notice to principal</i>	1069
<i>Comparison of old law and new rule under Conveyancing Act, 1882</i> ..	1070
<i>Summary of old law</i>	1071
<i>Alteration effected by Act of 1882</i>	1072
<i>Act of 1882 does not affect case of first mortgagee becoming himself second mortgagee</i>	1073
<i>Notice affects voluntary grantees of person who has received notice</i> ..	1074
<i>Fraud of agent does not generally affect principal</i>	1075
<i>Relation of principal and agent must subsist at date of transaction</i> ..	1076
<i>Country solicitor and his London agent both considered agents of clients</i> ..	1077
<i>Bank manager is agent for the bank</i>	1078
<i>Employment of agent in part only of transaction</i>	1079
<i>Where mortgagee employs no solicitor and mortgage prepared by mortgagor or his solicitor</i>	1080
<i>Solicitor who prepares mortgage not necessarily agent to receive subsequent notices</i>	1081

Notice to agent is notice to principal.

1069. Notice to him who transacted, is notice to him for whom he transacted (b) ; and the infancy of the latter makes no difference (c) (1249). Lord *Chelmsford* is reported to have said (d), that the notice which the client receives through his solicitor ought rather to be considered as actual than as constructive notice, because it does not depend upon communication ; a person who employs a solicitor being bound by the knowledge which he has acquired, whether it be communicated or not. It is submitted that even if this were universally true, the supposed consequence would not follow. When the knowledge of the agent and his agency have been proved, it is by conclusion of law that the principal has notice ; and the very fact that the notice does not depend upon communication, and therefore cannot be established by evidence, shows that it is not actual notice, which is a question of fact ; but implied or constructive notice, which is a question of law (e). Further, the principal is not always bound by the knowledge of the agent ; and the question whether he is so or not is entirely a question as to the application of the rule of law.

Comparison of old law with new rule under Conveyancing Act, 1882.

1070. The provision of the Conveyancing Act, 1882, s. 3, (1065) that a purchaser shall not be affected by notice through an agent, unless the fact has come to the knowledge of the agent, as such, in the same transaction in which the question of notice arises, proceeds upon the law as it was understood in the early days of

(b) *Merry v. Abney*, 1 Ch. Ca. 38 ; *Tibbits v. George*, 5 Ad. & El. 107 ; *Downes v. Power*, 2 Ba. & Be. 491.
(c) *Toulmin v. Steere*, 3 Mer. 210.
(d) *Espin v. Pemberton*, 3 De G. & J. 547.
(e) Co. Litt. 309 b.

equity, viz., that the principal is affected by notice of such matters only as come to the knowledge of the agent at the particular time while he is actually concerned for the principal, and in the course of the very transaction which becomes the subject of the suit; for it was said that otherwise the men of the most practice and eminence would be the most dangerous to employ, and because an agent might forget what he had learned in a different affair (*f*).

But it was afterwards held that where the prior transaction could be shown to have been present to the agent's mind, notice arose (*g*). And further, that where an agent was employed by a person in effecting several incumbrances, and acted in those matters for the mortgagees also, although the transactions were distinct, the later mortgagees should be affected (*h*) by notice of the earlier mortgages; and so where the agent for the mortgagees was himself the mortgagor (*i*). Moreover, where the agent had been employed by several persons, one of them might be affected with notice of what the agent knew as agent for the other, even before his retainer for the person affected (*k*). Whatever the agent, during his retainer knew as agent for either party, might possibly in some cases affect both, without reference to the time when the knowledge was first acquired. But this was doubted by Lord *Herschell* (*l*).

1071. It is considered that some of the practical results of these decisions were, that—

Paragraphs
1070—1071

Summary of
old law.

- (1.) A mortgagee was not generally affected with notice
 - (a) of matters touching his security, by reason of knowledge acquired by his counsel, solicitor, or other agent, in a different transaction; or
 - (b) of matters which it was not the duty of the agent to communicate, or material for the principal to know (*m*).
- (2.) Where an agent had been employed both by the same mortgagor, and by several successive mortgagees, in effecting the mortgages, the later mortgagees had notice of the earlier mortgages. But it is questionable whether the earlier mortgagees would be taken to have notice of the later ones, even where the solicitor continues to act for them, *ex. gr.*, in selling the property (*n*).

(*f*) *Fitzgerald v. Fauconbridge*, *Fitzgibbon*, 207; *Lowther v. Carlton*, 2 Atk. 242; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Preston v. Tubbin*, 1 Vern. 286. See *Hiern v. Mill*, 13 Ves. 114.

(*g*) *Hargreaves v. Rothwell*, 1 Keen, 154.

(*h*) *Brotherton v. Hatt*, 2 Vern. 574; *Hargreaves v. Rothwell*, *supra*; *Winter v. Lord Anson*, 1 Sim. & St. 434; *Gerrard v. O'Reilly*, 3 Dru. & War. 414.

(*i*) *Sheldon v. Cox*, Ambl. 624; *Dryden v. Frost*, 3 Myl. & Cr. 670; *Marjoribanks v. Hovenden*, Dru. 11.

(*k*) *Warwick v. Warwick*, 3 Atk. 291; *Le Neve v. Le Neve*, 3 Atk. 646; *Fuller v. Bennett*, 2 Hare, 394; *Frail v. Ellis*, 16 Beav. 350; *Tweedale v. Tweedale*, 23 Beav. 341.

(*l*) *Thorne v. Heard*, [1895] A. C. 495, 501.

(*m*) *Wyllie v. Pollen*, 32 L. J. Ch. 782.

(*n*) *Thorne v. Heard*, [1895] A. C. 495.

Paragraphs
1071—1075

(3.) As to such of the securities, in which the agent was not employed by both parties, the later mortgagees would not by employment of the same agent, be necessarily affected by notice thereof.

(4.) Yet they might be so affected, if it were shown that at the time of making the later mortgages, the earlier ones were known to, and at the time were actually present to the mind of, the agent. And it seems (o), that they might be affected inferentially also, if one transaction so closely followed the other as to afford an irresistible presumption that the earlier one was so present to his mind.

Alteration
effected by
Act of 1882.

1072. The statute of 1882 appears to confirm the law as stated in Rule 1 (a), and not to affect that stated in Rule 1 (b). Rule 2 is abrogated unless the successive mortgages, from proximity of date or other circumstances, can be considered to have been made not merely in the course of a continuous dealing with the same title, but in the course of the same transaction (p).

But no notice can arise under the circumstances mentioned in Rules 3 and 4 so long as the transactions are different.

Act of 1882
does not
affect case of
agent of first
mortgagee
becoming
himself
second
mortgagee.

1073. It is also considered that the statute does not affect the previous rule that where the agent who effected the earlier mortgage becomes second mortgagee of the same property (q); or the steward of a manor who, after having admitted a prior mortgagee, takes for himself a subsequent mortgage (r); they cannot deny notice of the earlier mortgages. Such notice, in fact, appears to be rather actual than constructive.

Notice affects
voluntary
grantees of
person who
has received
notice.

1074. The rule will affect a person to whom another, to get rid of notice, has voluntarily transferred his purchase. As where A. having agreed for a lease, had notice that B. had a prior agreement, and thereupon procured the lease to be made to his own son; the latter was affected by the notice acquired by the father (s).

Fraud of
agent does
not generally
affect
principal.

1075. The statute makes no mention of fraud, and probably does not affect the law which previously related to it; for, otherwise, an agent, under shelter of the Act, might use the knowledge which he acquired in one transaction for the purpose of committing a fraud in another.

Independently of the statute, the effect of fraud is, that notice does not arise between principal and agent, where the transaction

(o) See *Gerrard v. O'Reilly*, 3 Dru. & War. 414.

(p) *Re Cousins*, 31 Ch. D. 671.

(q) *Perkins v. Bradley*, 1 Hare, 219.

(r) *Brotherse v. Bence*, Fitzg. 118. Mr. Coventry says the prior entry must have been [during the steward's own time (2 Pow. Mort. 563, note, ed. 6), and though his authority does not say so (*Welman v. Warren*, 2 Eq. Ca. Abr. 595), this must be assumed, for otherwise it certainly would not be actual notice.

(s) *Merry v. Abney*, 1 Ch. Ca. 38; *Coote v. Mammon*, 5 Bro. P. C. 355.

effected by the agent is itself founded in fraud, in which the agent is so concerned that it is certain he would conceal it; as where a mortgagor, by fraudulently obtaining an assignment of the mortgage, effected a new security to another person, acting himself as solicitor to both mortgagees; or is otherwise concerned in a deliberate fraud (*t*). But if the matter be not fraudulent so as to destroy the presumption of disclosure, upon which the courts act in cases of constructive notice, the mortgagee may be affected by the agent's knowledge. For instance, if after a first mortgage by deposit of deeds, the solicitor who effected it, being also the mortgagor, mortgages again, acting as solicitor for the new mortgagee, and not disclosing the prior deposit; here the transaction being valid in itself, and its existence not inconsistent with a disclosure of the first mortgage (as the second mortgagee might well have been content to take subject to the first), application of the ordinary doctrine of notice may apply. And though it may be for the interest of the solicitor to conceal the first security, the court will not *presume* that he will neglect his duty by so doing (*u*).

Paragraphs
1075—1078

In all these cases the burden of proof is upon the client to show the probability of non-communication of the fact by the agent (*x*).

1076. The relation of principal and agent must subsist at the time of the transaction. But actual retainer of a person as agent seems unnecessary; for even where the person to be affected knows nothing of the matter until after its completion, if he then acts upon or adopts it, he thereby makes the agent, his agent *ab initio*. Nor is it important that the agent, if he were trusted, was recommended by the very person whose acts are the subjects of the notice (*y*).

Relation of
principal and
agent must
subsist at
date of
transaction.

1077. For the purpose of affecting a client with notice the country solicitor and his London agent are considered as one person; the notice acquired by either equally affecting the client (*z*).

Country
solicitor and
his London
agent both
considered
agents of
client.

1078. A bank manager is the agent for his bank so as to affect them with constructive notice of facts communicated to him (*a*).

Bank
manager is

(*t*) *Kennedy v. Green*, 3 Myl. & K. 699; *Waldy v. Gray*, L. R. 20 Eq. 238; *Thompson v. Cartwright*, 9 Jur. (N.S.) 940, affd. 1215; *Cave v. Cave*, 15 Ch. D. 639; *Chaplin v. Cave*, 49 L. J. Ch. 505; *Re Richards, Humber v. Richards*, 45 Ch. D. 589; *Rhodes v. Moules*, [1895] 1 Ch. 236; but see and consider *Re Weir, Hollingworth v. Willing*, 58 L. T. 792.

(*u*) *Le Neve v. Le Neve*, 3 Atk. 646; *Hewitt v. Loosemore*, 9 Hare, 449; *Bradley v. Riches*, 9 Ch. D. 189; *Atterbury v. Wallis*, 2 Jur. (N.S.) 1177; *Rolland v. Hart*, L. R. 6 Ch. 678. See *Nixon v. Hamilton*, 2 Dru. & Wal. 364.

(*x*) *Thompson v. Cartwright*, 33 Beav. 178, and *supra*.

(*y*) *Jennings v. Moore*, 2 Vern. 609; *S. C.*, *Blenkarne v. Jennens*, 2 Bro. P. C. 278; *Le Neve v. Le Neve*, 3 Atk. 646.

(*z*) *Norris v. Le Neve*, 3 Atk. 26; Sugd. V. & P. 756, 14th ed.

(*a*) *Re Macnamara*, 13 L. R. Ir. 158.

Paragraphs
1079—1081

agent for the
bank.

Employment
of agent in
part only of
transaction.

Where
mortgagee
employs no
solicitor, and
mortgage
prepared by
mortgagor or
his solicitor.

Solicitor who
prepares
mortgage not
necessarily
agent to
receive
subsequent
notices.

1079. If the agent be employed in part only of the transaction, notice arises of whatever came to his knowledge during his agency (*b*); at the termination of which, the client takes the business with all the knowledge acquired in relation to it.

What might be the result of the mere delivery of papers to the agent, that he might enter upon the business, if he never did so, and never inspected them, has been doubted (*c*); but since the Act of 1882 it seems clear that no notice would be created under such circumstances.

1080. It has been said, that if the mortgagor himself prepare the security (*d*), and no other solicitor be employed, the mortgagor will still be the mortgagee's agent, for he is intrusted with the duties which belong to the mortgagee's solicitor; and it makes no difference that the mortgagee pays him nothing for his services, because it is the nature of the transaction that all the expenses should be borne by the mortgagor. But if the mortgagee employ no solicitor, it will not be assumed, in the absence of evidence, that the mortgagor's solicitor acted for him (*e*). The proposition that the mortgagor, where he is a solicitor, will be assumed to act as the mortgagee's solicitor, is, however, disputed by Lord *Chelmsford* (*f*), by whom the case is put on the same footing as that in which the mortgagor alone employs a solicitor, who is not to be treated as the mortgagee's agent, unless there is evidence of the existence of that relation between them. Where both parties employ the same solicitor, the knowledge of the mortgagor will not be notice to the mortgagee (*g*). And the same principle applies where the same person acts as officer of two companies (*h*).

1081. A solicitor is not an agent for the purpose of receiving notice of an incumbrance on or other dealings with the security, merely because he was employed to invest the money, or even, it is said, because he afterwards, for convenience, received the interest from the mortgagor, and paid it by direction of the mortgagees to the persons entitled (*i*).

(*b*) *Bury v. Bury*, Sugd. V. & P. App. No. 25, ed. 11; Pow. Mort. 587, ed. 6; see *Vane v. Lord Barnard*. Gilb. Eq. R. 6.

(*c*) Pow. Mort. 588, ed. 6.

(*d*) *Kennedy v. Green*, 3 Myl. & K. 699; *Hewitt v. Loosemore*, 9 Hare, 449.

(*e*) *Atterbury v. Wallis*, 2 Jur. (N.S.) 343. But the Lords Justices decided the case in 8 De G. M. & G. 454, according to the rule in *Hewitt v. Loosemore*, *supra*.

(*f*) *Espin v. Pemberton*, 3 De & G. J. 547. See *Kettlewell v. Watson*, 21 Ch. D. 685.

(*g*) *Re Cousins*, 31 Ch. D. 671.

(*h*) *Re Hampshire Land Co.*, [1896] 2 Ch. 743.

(*i*) *Saffron Walden, etc., Building Society v. Rayner*, 14 Ch. D. 406.

SECTION III.

Paragraph
1082

Constructive Notice by knowledge of particular Facts or Instruments which ought to have led to inquiry or inspection.

	PARAGRAPH
<i>What inquiries and inspections ought to be made</i>	1082
<i>Recitals or knowledge of the existence of deeds give notice of their contents</i>	1083
<i>Notice of a transaction is generally notice of the equities arising out of it</i>	1084
<i>Notice from peculiarity of conveyance</i>	1085
<i>Distinction between notice of instruments which necessarily affect title and those which do not</i>	1086
<i>Whether notice of existence of a will is notice of its contents to one dealing with testator's heir</i>	1087
<i>Notice of entail</i>	1088
<i>Notice of assignment of satisfied term not notice of limitation of inheritance</i>	1089
<i>Notice of facts imputes notice of doctrines of equity applicable to them</i>	1090
<i>Notice of marriage articles imputes notice of defects in settlement purporting to be made in pursuance of them</i>	1091
<i>Questionable whether notice of transactions under which, in equity, charges have been extended to lands not originally charged, is notice of such extension</i>	1092
<i>Witness to a document has no notice of its contents</i>	1093
<i>Notice of an instrument is notice of its contents even although no lawyer employed</i>	1094
<i>Person taking subject to incumbrance has full notice of its details</i> ..	1095
<i>No notice if inquiry would not elicit existence of incumbrance</i>	1096
<i>Person to whom an instrument is brought for examination has notice of contents</i>	1097
<i>Person who has searched for judgments has notice of them</i>	1098
<i>Fact that instrument relates to other lands does not affect a subsequent transaction in relation to such other lands</i>	1099
<i>Effect of negligence in inquiring into title and as to title deeds</i>	1100
<i>Notice of one defect is no notice of another</i>	1101
<i>Notice of purchase from a person is not notice that purchase-money unpaid</i>	1102
<i>Person may have no notice of documents in his own possession</i>	1103
<i>The custody of a client's title deeds by his solicitor is not notice of incumbrance in favour of solicitor</i>	1104
<i>Onus of proof of notice</i>	1105
<i>Underwriter's notice of broker's lien</i>	1106

1082. The next question which arises under the 3rd section of the Conveyancing Act, 1882, is, what inquiries and inspections ought reasonably to have been made by a purchaser or mortgagee or his solicitor or other agent, to relieve him from notice of any instrument, fact or thing, which may prejudicially affect the title? And it may be stated generally, as a principle by which the courts were guided before the Act, that where a person has actual notice that the estate with which he is dealing is charged or otherwise affected, it is his duty to inquire into the extent and nature of the charges; and he must not assume that the reference is only to charges which are already known to him (j). But if there be no

What inquiries and inspections ought to be made.

(j) *Jones v. Williams*, 24 Beav. 47.

Paragraphs actual notice that the estate is affected, and *no turning away from*
 1082—1083 *the knowledge of facts, which the res gestæ would suggest to a prudent*
mind, there will be no constructive notice (*k*). But an intended mortgagee must satisfy himself that the intended mortgagor has at least a *prima facie* title. It is not sufficient for him merely to put the question, "Is this your property?" (*l*). He will, in fact, be deemed to have notice of all facts, which he would have learned upon a proper investigation of the title, under a contract containing no restriction of his rights in that respect (*m*). If, therefore, he does not ask for the title deeds, he will be affected with notice of the rights of an undisclosed mortgagee in whose custody they are (*m*). The fact that he does not employ a solicitor, and is himself ignorant of the law, is immaterial (*m*).

Recitals or knowledge of the existence of deeds give notice of their contents.

1083. Where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall have notice of that fact; for by going from one deed to another, the whole matter would have been discovered, and it is *crassa negligentia* if he sought not after it (*n*). It is, therefore, a rule, that notice of whatever is recited or referred to in an instrument, is imputed by notice of the instrument itself (**1095**); except, it seems, that in cases of fraud, none but the parties to the deed are affected by constructive notice of the fraud (*o*). Hence notice of a lease is notice of all covenants in it, whether usual or unusual (*p*). This is now said to hold only when the purchaser has a fair opportunity of ascertaining the provisions of the lease (*q*). And as he has notice because it was his duty to inquire, he certainly ought to be excused if he shows that he could not perform that duty. Beyond this, the decision appears not to alter the former law. So trustees on the distribution of their trust fund who pay to the solicitor of one of their beneficiaries on the faith of his statement that he is the assignee of that beneficiary, without calling upon him to produce the assignment, are liable to a mortgagee of that beneficiary whose mortgage is recited in the assignment, although he had not given them notice of his mortgage (*r*). A purchaser is bound by a mortgage, though

(*k*) *Jones v. Smith*, 1 Hare, 56 (affirmed 1 Ph. 244), and *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700, where the mortgagee knew that the mortgaging company had issued debentures, but was told that they did not affect the property proposed to be mortgaged to his client; and see also *Re Castell and Brown, Ltd.*, *Roper v. The Co.*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co., Ltd.*, *Ward v. The Co.*, [1903] 2 Ch. 654; and *Re Bourne*, *Bourne v. Bourne*, [1906] 2 Ch. 427.

(*l*) *Mulville v. Munster, etc., Bank*, 27 L. R. Ir. 379.

(*m*) *Per Joyce, J., Berwick & Co., v. Price*, [1905] 1 Ch. at p. 638; and see *Lloyd's Banking Co. v. Jones*, 29 Ch. D. 221, and *Oliver v. Hinton*, [1899] 2 Ch. 264.

(*n*) *Moore v. Bennet*, 2 Ch. Ca. 246.

(*o*) *Read v. Ward*, 7 Vin. Abr. 123.

(*p*) *Taylor v. Stibbert*, 2 Ves. Jun. 437; *Cosser v. Collinge*, 3 Myl. & K. 283; *Martin v. Cotter*, 3 Jo. & Lat. 497; *Grosvenor v. Green*, 5 Jur. (N.S.) 117.

(*q*) *Hyde v. Warden*, 3 Ex. D. 72; and see *Reeve v. Berridge*, 20 Q. B. D. 523; and *Re White and Smith's Contract*, [1896] 1 Ch. 637.

(*r*) *Davis v. Hutchings*, [1907] 1 Ch. 356.

not particularly specified (*s*), if the deed, subject to or under which he claims, shows the existence of prior mortgages. But there is no notice where a representation is made concerning the deed which is calculated to mislead, and to disarm inquiry (*t*). And though a deed was expressly made without prejudice to the incumbrances affecting the estates, a *puisne* mortgagee was held not to be affected with constructive notice of an equitable assignment of a prior charge which had been subsequently released by the person legally entitled to it; the release being within the knowledge of the subsequent mortgagee and it being apparent under the circumstances, that the released charge was not intended to be included among the existing incumbrances (*u*).

Where a widow, tenant for life, married, and represented herself to be, and dealt with the estate as, owner in fee, and conveyed in that character to her husband; on a question between his heir and her appointee under a power executed before her second marriage, it was held (*x*), that the husband was not a purchaser for valuable consideration without notice of his wife's real interest. For he was either negligent in not examining the only deed under which she claimed, or guilty of fraud in taking a conveyance in fee with knowledge of her limited interests. So a broker who insured ships by direction of the owner, knowing that they were mortgaged, was presumed (*y*) to have known also that in the mortgage deed was a covenant to insure the ships; whence, by inquiry of the mortgagees, he might have ascertained that the insurance was made for their benefit, in pursuance of the covenant. And notice that a ship is in mortgage, is enough to put brokers advancing money upon inquiry whether the mortgage does not include the freight, earnings and profits (*z*).

And so, where the appointees of a tenant for life had notice of a prior mortgage containing covenants by the appointor not to exercise his power to the mortgagee's prejudice, they were postponed to him, though a reversionary term, not subject to the mortgage term, had been limited to them for their security, and though taking under the interest which created the power, they had an estate which the mortgage did not touch (*a*).

(*s*) *Eland v. Eland*, 1 Beav. 235; *Farrow v. Rees*, 4 Beav. 18; and see *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Bisco v. Earl of Banbury*, 1 Ch. Ca. 291; *Davies v. Thomas*, 2 Y. & C. Ex. 234; *Hamilton v. Royse*, 2 Sch. & Lef. 315; *Mertins v. Jolliffe*, Ambl. 311; *Ingram v. Pelham*, Ambl. 153. The false recital of a present advance, which is often introduced into mortgages to secure antecedent debts, does not import notice of fraud. *Per* TURNER, L.J., in *Greenfield v. Edwards*, 13 W. R. 668.

(*t*) *Drysdale v. Mace*, 2 Sm. & G. 225 (affirmed 5 De G. M. & G. 103).

(*u*) *Greenwood v. Churchill*, 6 Beav. 314.

(*x*) *Jackson v. Rowe*, 2 Sim. & St. 472; though a contrary doctrine was formerly held. See *Phillips v. Redhil*, cited 2 Vern. 159.

(*y*) *Ladbroke v. Lee*, 4 De G. & Sm. 106.

(*z*) *Gibson v. Ingo*, 6 Hare, 112.

(*a*) *Hurst v. Hurst*, 16 Beav. 372.

Paragraphs **1084.** Nor is the rule under consideration confined to plain
1084—1085 recitals of matters of fact. A purchaser will generally be bound
 Notice of a by the particulars, and even sometimes by the equities, arising
 transaction is generally out of an important or peculiar transaction, recited or referred
 notice of the to in a deed or abstract, of which he has notice, and concerning
 equities which transaction it becomes his duty to inquire. Thus notice
 arising out of it. will be imputed of the particulars of a trust, of the existence of
 which there is actual notice (*b*). But the notice must be clear.
 For instance, where shares were transferred to the manager of a
 bank upon certain trusts, and the only notice which his transferees
 had of the trusts was the fact that in the deed of transfer the words
 “manager in trust” were appended to the signature of the bank
 manager, it was held that the notice was ineffectual; for those
 words naturally imported that he held the shares in trust for his
 employers, and were not calculated to suggest that he stood in a
 fiduciary relation to a third party (*c*). Notice of the revocation or
 exercise of a power, gives constructive notice of whatever may
 concern the parties in the execution of the power (*d*), and of im-
 proper dealings with an estate in the professed exercise of a power,
 where suspicious circumstances are apparent (*e*). And one who
 has notice of a post-nuptial settlement affecting property which
 he has agreed to purchase, is bound to inquire if it be supported
 by an ante-nuptial agreement (*f*). So the purchasers of under-
 leases having notice of a lease purporting to be made by husband
 and wife, under which they claimed, were fixed with notice that
 her interest was inalienable (*g*). And a person who lent money on
 the security of a contract for sale, was not allowed to tack, for want
 of equal equity with another incumbrancer, of whose charge he
 had no distinct knowledge; because (*h*) the contract being for a
 purchase free from incumbrances, he knew that he was dealing with
 a fund, out of which any incumbrances must be paid.

Notice from
 peculiarity of
 conveyance.

1085. So, if there be anything peculiar in the manner of con-
 veying. A purchaser has notice of a prior title, by the concurrence
 in his conveyance of persons interested under that title; as of
 devisees (*i*), where the grantor claims as heir at law; although
 the deed contain no explanation of their concurrence. But it has
 been held, that a covenant in a settlement that a minor should
 execute, was no notice of his interest (*k*). “This might have had

(*b*) *Malpas v. Ackland*, 3 Russ. 273.

(*c*) *London and Canadian, etc., Co. v. Duggan*, [1893] A. C. 506.

(*d*) *Lord of Banbury's case*, Freem. Ch. 8; and *Lord Crawly's case*, cited there;
Robinson v. Briggs, 1 Sm. & G. 188.

(*e*) *Robinson v. Briggs*, *supra*.

(*f*) *Ferrars v. Cherry*, 2 Vern. 383.

(*g*) *Steedman v. Poole*, 6 Hare, 193.

(*h*) *Lacey v. Ingle*, 2 Ph. 413; see also *Taylor v. Baker*, Dan. 71.

(*i*) *Burgoyne v. Hatton*, Barn. Ch. 236; and see *Att.-Gen. v. Hall*, 16 Beav. 388.

(*k*) *Howarth v. Dean*, 1 Eden, 355.

some colour," Lord *Northington* is reported to have said, in answer to the argument, that inquiry should have been made, "if he had been of maturity, but it was a covenant necessary to make him a party to the settlement. Therefore, I think the circumstance does not prove notice." This distinction seems to be as doubtful, as the reasoning is obscure.

A mortgagee has been held affected with notice of an agreement for a prior mortgage, by notice that the mortgagor had not paid for the estate (*l*), the conveyance being also peculiar in form. It has been said, that the inadequacy of the purchase-money, in comparison with the real value of the property, is notice of the existence (*m*) of an incumbrance. And where a lease, being a mere husbandry lease, was made of charity lands, at a small rent, and for a long period, the transaction was held so manifestly bad for the charity, as to bear on the face of it notice of a breach of trust (*n*); with which the purchaser was accordingly fixed.

The circumstance that, upon the renewal of a lease, the lessors are not the same persons who were lessors in the original lease, is one which ought to lead the lessee to inquire into their title, and is sufficient (*o*) to fix him with notice of a trust. It is, however, to be observed with respect to the title to leases, that, although a purchaser is bound to know from whom the lessor derived his title, he is not bound to take notice of all the circumstances under which the title is derived. So that where the infirmity of a lease depends upon matters *dehors* the instrument, the purchaser will not be affected (*p*).

1086. A distinction is here to be noted, between notice of instruments, or matters, which must of necessity, and of those which do not of necessity, affect a title. Actual notice of a deed of the first kind is constructive notice (*q*) of its contents, and of everything to which it refers. But notice of a deed of the other kind only requires (*r*) that the person who has it shall act honestly, and shall not be guilty of gross negligence. Such a person will not be affected only because he has not done all that a prudent, cautious or wary person would have done, unless it can be said not only that he might, but also that he ought, but for gross negligence, to have ascertained the fact, with notice of which it is sought to affect him.

Distinction between notice of instruments which necessarily affect title, and those which do not.

(*l*) *Frail v. Ellis*, 16 Beav. 350.

(*m*) *Stockdale v. South Sea Co.*, Barn. Ch. 363.

(*n*) *Att.-Gen. v. Pargeter*, 6 Beav. 150; and see *Att.-Gen. v. Pilgrim*, 12 Beav. 57, affirmed 2 H. & Tw. 186.

(*o*) *Att.-Gen. v. Hall*, 16 Beav. 388.

(*p*) *Id.*; *Att.-Gen. v. Backhouse*, 17 Ves. 283.

(*q*) *Jones v. Smith*, 1 Ph. at p. 253.

(*r*) *Ex. gr.*, a marriage settlement; *Jones v. Smith*, 1 Ph. at pp. 254, 257; and see *Finch v. Shaw*, 18 Jur. 935, affirmed (*sub nom. Colyer v. Finch*) 5 H. L. C. 922; *Lloyd's Banking Co. v. Jones*, 29 Ch. D. 221, 230; or debentures, *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700.

Paragraphs
1086—1087 deed, which may possibly leave room for suspicion of what the purchaser cannot know to be, and which may not be true, is not notice which will affect him (s). And where an abstract contained a certificate of the redemption of land tax, not by a tenant in fee, but by persons described as trustees and guardians of a minor, and on his behalf, it was held that the purchaser was not bound to inquire how the redemption was wrought out, and was not fixed with notice that the charge had not been extinguished (t). The rule, that circumstances which might lead to suspicion only are not notice, also appears by the decision, that an entry in the margin of an insurer's declaration, directing that letters relating to the policy should be sent to a certain solicitor, was no notice (u) of the interest of that person's client in the policy, there being nothing to show for whom he acted, or that any change of interest had taken place. It is obvious that such cases as these depend mainly upon their own circumstances, and it has been well observed (x) that that which will not affect one man may be abundantly sufficient to affect another.

It must also be remembered that circumstances which may affect a trustee with notice, are not of necessity sufficient to make a person liable as a constructive trustee (y).

Whether
notice of
existence of
a will is
notice of its
contents to
one dealing
with
testator's
heir.

1087. It has been doubted (z) whether a purchaser from an heir at law, with notice of a will of the ancestor under whom the heir claimed, would be affected with notice of the contents of the will, though in truth he were ignorant of them, and even misled by the heir at the time of the purchase. It has been intimated that such a case would depend upon circumstances. But it is submitted that it could rarely happen that a mortgagee with notice of a will would be justified in taking from an heir-at-law without inquiry (a). The fact of the heir's being in possession, even for a long period, would probably make little difference. He might be there as tenant for life, or under a lease from the devisee. And it is conceived that an inquiry of, and misrepresentation by, the heir himself, would not save the purchaser if he could have got information elsewhere: for the person who is bound to inquire must use the best means of knowledge which are practically within his reach, and of which a prudent man might be expected to avail himself (b).

(s) See *M'Queen v. Farquhar*, 11 Ves. at p. 482; *Whitfield v. Fausset*, 1 Ves. Sen. 387. See *Dodds v. Hills*, 2 H. & M. 424.

(t) *Ware v. Lord Egmont*, 4 De G. M. & G. 460.

(u) *West v. Reid*, 2 Hare, 249. See *Wyatt v. Barwell*, 19 Ves. 435; *Eyre v. Dolphin*, 2 Ba. & Be. 290.

(x) *Per WIGRAM, V.-C., Jones v. Smith*, 1 Hare, at p. 55 (affirmed 1 Ph. 244).

(y) *Williams v. Williams*, 17 Ch. D. 437.

(z) *Jones v. Smith*, *supra*.

(a) And see *Burgoyne v. Hatton*, Barn. Ch. 236.

(b) See *Broadbent v. Barlow*, 7 Jur. (N.S.) 479.

If he have inquired honestly and with sufficient diligence he may, *Paragraphs* it is true, be believed where he has been misled by false informa- 1087—1090 tion (c); but it is conceived, that to ask those only, against whose possible fraud the inquiries are intended to be the safeguard, is in general not sufficient diligence. A person who deals with a mortgagor in a matter which may be affected by the mortgage of which he has notice, will not be excused because he was misled by the mortgagor, if it were in his power to learn the truth from the mortgagee (d). On this principle a *puisne* mortgagee, who was informed by the mortgagor that he had previously given a judgment or warrant of attorney, as a security, to a certain creditor, was held (e) to have notice that that security was in truth a mortgage; for the means of better information were within his reach.

1088. A person who takes under a deed containing notice of an entail prior to the estate which he claims, must look (f) that the entail be spent. It is not enough to deny knowledge of the existence of the heir in tail. Notice of entail.

1089. The assignment of a term expressly to attend the inheritance, is not notice to a mortgagee, (any more than where the term is attendant by construction of equity), that there are limitations of the inheritance to be protected by it; but merely that the term is attendant, and that there is an inheritance to be protected. But, if the trust be declared to attend the inheritance as limited by such a deed, or to protect the uses of such a settlement, that is notice of the deed or settlement (g). Notice of assignment of satisfied term, not notice of limitations of inheritance.

1090. Notice will also arise where the matter depends upon the application of a clear equitable doctrine. Therefore notice of the reservation of an equity of redemption is notice (h) of the mortgage title, if the court be of opinion that the equity still subsists. So, where a person having a limited interest in leaseholds, obtained, by means of it, favourable renewals (i),—it being clear that such renewals would be for the benefit of those in remainder (k). And he who deals with an agent, who bought from his principal, having knowledge of the fact (l); or who purchases a fund, settled in consideration of a covenant which remains unperformed (m); Notice of facts imputes notice of doctrines of equity applicable to them.

(c) *Jones v. Smith, supra*; *Jones v. Williams*, 24 Beav. 47.

(d) See *Ladbroke v. Lee*, 4 De G. & Sm. 106.

(e) *Taylor v. Baker*, Dan. 71. See *Heathorn v. Darling (The Eliza)*, 1 Moore, P. C. 5. (f) *Kelsall v. Bennet*, 1 Atk. 522.

(g) *Per* Lord HARDWICKE, *Willoughby v. Willoughby*, 1 T. R. at p. 769.

(h) *Hansard v. Hardy*, 18 Ves. 455. (i) *Parker v. Brooke*, 9 Ves. 583.

(k) 4 Bac. Abr., 922; *Eyre v. Dolphin*, 2 Ba. & Be. 290; *Bury v. Bury*, Sugd. V. & P. App. 1127, ed. 11.

(l) *Molony v. Kernan*, 2 Dru. & War. 31; *Dunbar v. Tredennick*, 2 Ba. & Be. 304.

(m) *Harvey v. Ashley*, cited 2 Sch. & Lef. 328; and see *Basevi v. Serra*, 14 Ves. 313.

Paragraphs or who takes a security given by a person who has recently attained
 1090—1092 majority, for the debt of a near relative, or person standing *in loco parentis* (*n*), is liable to all the equities to which such transactions are subject.

But where the construction of a deed is so uncertain, and the equity so doubtful, that the decision of the court cannot be known, a purchaser for valuable consideration, denying actual notice, will not be affected (*o*). In a case in which a will had been made in a foreign language, and the original was lost, the nicety of the distinction between the words *children* (which was used in the translation) and *issue*, went far to induce the court to hold, that the defendant, a purchaser for valuable consideration, and who had long been in possession, the plaintiff standing by, had no notice; and though two decrees had been made for the plaintiff, the bill was dismissed (*p*).

Notice of marriage articles imputes notice of defects in settlement, purporting to be made in pursuance of them.

1091. Where the doubt is caused by the fact, that the settlement, of which the purchaser had notice, was not framed according to prior articles, or the rules of equity, in regard to the form of such instruments, it appears (*q*) to be the better opinion, that in cases, at least of modern articles, a mortgagee will now be affected by notice of the equities which arise under them. It has been laid down by Lord *St. Leonards* (*r*), that if the construction be upon the whole plain, though difficult, and a long period have not elapsed, a purchaser with notice leading to the articles will be bound; but not after a lapse of time, where there is anything so equivocal or ambiguous in them as to render it doubtful how they ought to be carried out. At the end of such a period as half a century, he said, a purchaser would not be fixed with notice of such an equity. The reader will here observe, that actual notice of a post-nuptial settlement is constructive notice of ante-nuptial articles upon which it is founded (*s*).

Questionable whether notice of transactions under which in equity charges have been extended to

1092. It has also been held, that where, by the rules of equity, one estate has become liable to the burden of incumbrances actually charged upon another, a purchaser, who has notice of the transactions which led to the operation of the rule, will be bound by the incumbrances (*t*). But the decision was more than once (*u*) disapproved of by Lord *St. Leonards*, on the ground, that a purchaser

(*n*) *Maitland v. Backhouse*, 12 Jur. 45; *Archer v. Hudson*, 7 Beav. 551.

(*o*) *Parker v. Brooke*, 9 Ves. 583; see *Cordwell v. Mackrill*, Ambl. 515; *Kenney v. Browne*, 3 Ridg. P. C. 462, 512.

(*p*) *Bovey v. Smith*, 1 Vern. 144.

(*q*) *Senhouse v. Earl*, Ambl. 285; Sugd. V. & P. 781, ed. 14.

(*r*) *Thompson v. Simpson*, 1 Dru. & War. 459.

(*s*) *Ferrars v. Cherry*, 2 Vern. 383.

(*t*) *Hamilton v. Royse*, 2 Sch. & Lef. 315.

(*u*) *Averall v. Wade*, Ll. & Goo. temp. Sugd. 252; V. & P. 1057, ed. 11; but see p. 776, ed. 14.

is not bound to know all the equities springing out of a particular deed. The doctrine of the cases just cited seems, in some measure, applicable to this point also. Paragraphs
1092—1096

1093. A witness, not being considered privy in practice to the contents of the deed, will not be affected with notice thereof, without proof that he knew the contents at the time (*x*). This is contrary to the earlier doctrine, that every witness, who can write or read, is presumed (*y*) to be acquainted with the substance of the instrument which he undertakes to support by his evidence; in which there was an obvious fallacy, for it is the execution, and not the contents, of the instrument which the witness undertakes to prove. lands not
originally
charged, is
notice of such
extension.
Witness to
a document
has no notice
of its
contents.

1094. A person will be affected with notice of the contents of an instrument brought to his actual knowledge, though it be artistically expressed, if the meaning be so plain, that an unprofessional person would not be misled (*z*); perhaps, if it were even less clearly expressed; for, otherwise, a man might avoid notice of the contents of a technically plain document, in his actual possession, by neglecting to employ a professional adviser. Notice of an
instrument
is notice of
its contents
even
although no
lawyer
employed.

1095. There will be full notice of an incumbrance as against a person who takes subject to it, although in the recital of it, it be inaccurately, or not completely described; as if the limitations of a will be inaccurately stated, or a settlement be incorrectly referred to as a power of jointuring (*a*); and the more clearly, if the incumbrance be stated as indefinite in amount (*b*), for then the *puisne* mortgagee cannot have been misled to his hurt. But it is not so of an imperfect or erroneous notice given by one person to another of a transaction in which the latter is interested. Hence a notice merely stating an assignment, by a certain deed, of reversionary interest, is not notice of a covenant in the deed that insurance premiums, paid by the grantee, should be charged upon the reversion (*c*). Person taking
subject to
incumbrance
has full
notice of its
details.

1096. But the matter, of which there is actual notice, must be so connected with that of which notice is to be implied, that an inquiry into the one would naturally lead to knowledge of the other. There will be no notice of matters merely collateral to the subject of inquiry. Therefore, a person affected by recitals in No notice if
inquiry
would not
elicit exis-
tence of
incumbrance.

(*x*) *Beckett v. Cordley*, 1 Bro. C. C. 353; *Welford v. Beezeley*, 1 Ves. Sen. 6; *Colman v. Sarrel*, 1 Ves. Jun. 50; *Harding v. Crethorn*, 1 Esp. N. P. 57; *Reed v. Williams*, 5 Taunt. 257; *Biddulph v. St. John*, 2 Sch. & Lef. 521; *per Lord ELDON*, *Rancliffe v. Parkyns*, 6 Dow. 224.

(*y*) *Mocatta v. Murgatroyd*, 1 P. Wms. 392.

(*z*) *Davies v. Davies*, 4 Beav. 54.

(*a*) *Hope v. Liddell*, 21 Beav. 183; *Bury v. Bury*, Sugd. V. & P. 1127, ed. 11.

(*b*) *Gibson v. Ingo*, 6 Hare, 112.

(*c*) *Re Bright's Trusts*, 21 Beav. 430; and see *Jones v. Smith*, 1 Ph. 244, 253.

Paragraphs the later deeds, will not, on that account, have notice (*d*) that the
 1096—1100 original purchase-money remains unpaid; for unless the fact be
 somewhere recited, or alluded to, an inquiry into the title would not
 lead to it.

Nor, for the same reason, will a purchaser from assignees or
 trustees have notice (*e*) of negligence or other matters amounting
 to a breach of trust, connected with the manner of selling.

Person to
 whom an
 instrument is
 brought for
 examination
 has notice of
 contents.

1097. He, to whom an instrument is brought for the express
 purpose of examination in the transaction (*f*), or for whose inspec-
 tion it is left open for examination in the transaction (*g*), or who is
 known to have inspected it (*h*), has actual or constructive notice of
 its contents, though the nature of the contents may have been
 misrepresented. A shareholder in a public company is not, how-
 ever, bound to have knowledge of the contents of the company's
 books, nor is he bound by acquiescence in entries in books which
 are merely produced at public meetings, and which he might then
 look at. But directors of the company are affected by notice of
 whatever it was necessary that they should know of the company's
 affairs and regulations for the due performance of their duties (*i*).

Person who
 has searched
 for judgments
 has notice of
 them.

1098. A person who, by himself or his agents, has searched
 for judgments (*k*), has notice of any that may have been regis-
 tered, though it only appear in evidence that searches were
 made (**1112**).

Fact that
 instrument
 relates to
 other lands
 does not
 affect a
 subsequent
 transaction
 in relation to
 such other
 lands.

1099. But the notice will not affect the purchaser, if he after-
 wards purchase other lands under a title independent of the instru-
 ment of which he had notice, though that instrument may have
 actually related to them; he being neither presumed to take notice
 of, nor bound to remember, more than is necessary to make out his
 title (*l*).

Effect of
 negligence in
 inquiring
 into title,
 and as to title deeds.

1100. Upon principles similar to those which have been already
 stated, rests the doctrine of constructive notice by reason of neglect
 on the part of a person who deals for an interest in property to
 inquire into the title, and to obtain possession of the deeds which
 are the evidences of it; for although the mere fact that the deeds
 are not forthcoming, or the want of success in arriving at the truth
 where the purchaser is misled, or want of prudence in not carrying his
 inquiries far enough, will not fix him with notice if he be not grossly

(*d*) *Cator v. Pembroke*, 1 Bro. C. C. 301; and on this point it has been said the
 case of *Davies v. Thomas*, 2 Y. & C. Ex. 234, cannot be supported; see Sugd. V. & P.
 879, ed. 11. But note, that in that case, the solicitor of the vendor and purchaser
 had notice that the money remained partly unpaid; and this solicitor was also
 a trustee of the settlement made by the purchaser.

(*e*) *Borell v. Dann*, 2 Hare, 440. (*f*) *Cosser v. Collinge*, 3 Myl. & K. 283.

(*g*) *Crofton v. Ormsby*, 2 Sch. & Lef. 583. (*h*) *Paterson v. Long*, 6 Beav. 590.

(*i*) *York and North Midland Rail. Co. v. Hudson*, 16 Beav. 485; *Re Newcastle-upon-Tyne Marine Insurance Co.*, 19 Beav. 97.

(*k*) *Procter v. Cooper*, 18 Jur. 444. (*l*) *Hamilton v. Royse*, 2 Sch. & Lef. 315.

negligent, or do not wilfully shut his eyes to the truth (*m*). Yet neglect to investigate the title for at least forty years before the contract (*n*), or to inquire after the deeds (*o*), or the wilful disregard of matters affecting the estate, the nature of which would be immediately disclosed by inquiry, are dealings so obviously tending to fraud, that though the omission to inquire does not proceed from fraudulent motives (*p*), the negligent person is held to be affected with all the notice that the fullest inquiry would have brought out as to the title of the holder of the deeds, or the claimant of an adverse interest in the estate (1200). Thus, notwithstanding s. 2 of the Vendor and Purchaser Act, 1874, a lessee or his assignee have notice of the lessor's title (*q*).

Paragraphs
1100—1101

A fortiori, if knowing (*r*) that the deeds are in deposit, or that the person with whom he deals is indebted, and has given security to another, and that the title deeds are not forthcoming (*s*), he abstains from seeking information as to their actual position. So, a mortgagee, who contents himself by examining the court rolls, where he would only find notice of *legal* incumbrances, shall not be excused (*t*) for neglecting to inquire for the copies of court roll. And a person who takes an equitable mortgage on copyholds from an heir at law, ought not to be satisfied by the deposit of a copy of his admission only, but should inquire for the admission of his ancestor also (*u*); and will otherwise be fixed with notice of a deposit of that admission.

A purchaser is not bound to inquire whether a mortgagee has made further advances since he had notice of the purchase (*x*).

1101. But the notice is only of matters relating to the title of the holder of the deeds, and does not extend to fraudulent dealings with the estate, committed by the person from whom inquiry should have been made (*y*). And in like manner, though a peculiarity in a deed, (such as the unusual position of a signature, or the manner of engrossing it), ought to cause inquiry, it will not lead to notice of a defect in the title with which it is not connected. For example,

Notice of
one defect is
no notice of
another.

(*m*) *Plumb v. Fluitt*, 2 Anst. 432; *Evans v. Bicknell*, 6 Ves. 174; *Jones v. Smith*, 1 Hare, 43, affirmed 1 Ph. 244; *Finch v. Shaw*, 18 Jur. 935, affirmed (*sub nom. Colyer v. Finch*), 5 H. L. C. 905; *Agra Bank v. Barry*, L. R. 7 H. L. 135; but conf. *Patman v. Harland*, 17 Ch. D. 353.

(*n*) *Re Cox & Neve*, [1891] 2 Ch. 109, 117; *Patman v. Harland*, 17 Ch. D. 353; *Worthington v. Morgan*, 16 Sim. 547. See *Stein v. Stein*, 16 W. R. 69.

(*o*) *Kennedy v. Green*, 3 Myl. & K. 699; *Jones v. Smith*, *supra*; *West v. Reid*, 2 Hare, 249; *Hewitt v. Loosemore*, 9 Hare, 449; *Whitbread v. Jordan*, 1 Y. & C. Ex. 303.

(*p*) *Jones v. Williams*, 24 Beav. 47.

(*q*) *Patman v. Harland*, *supra*; *Mogridge v. Clapp*, [1892] 3 Ch. 382, 397.

(*r*) *Birch v. Ellames*, 2 Anst. 427; *Hiern v. Mill*, 13 Ves. 114.

(*s*) *Whitbread v. Jordan*, 1 Y. & C. Ex. 303.

(*t*) Id.

(*u*) *Per Lord BLACKBURN, London and County Banking Co. v. Ratcliffe*, 6 App. Cas. 722.

(*x*) *Tylee v. Webb*, 6 Beav. 552.

(*y*) *Hipkins v. Amery*, 2 Giff. 292.

Paragraphs
1101—1106

though the absence of a receipt on the back of a conveyance (before the Conveyancing Act, 1881) would have been notice of a lien for unpaid purchase-money, it would have no weight as notice that the grantor was of unsound mind, or that he executed the deed under undue influence (*z*).

Notice of
purchase
from a person
is not notice
that purchase-
money
unpaid.

1102. A subsequent purchaser will not be affected with notice of non-payment of the purchase-money to the original vendor, only because the title is deduced by recital from him; for the recital does not show the non-payment (*a*). And if the vendor acknowledge the receipt of the whole purchase-money, both in the deed and by an indorsement thereon (*b*), (or in deeds executed since the Conveyancing Act, 1881, either in the deed or by indorsement thereon), no inquiry is necessary whether the payment was in fact made.

Person may
have no
notice of
documents
in his own
possession.

1103. It seems that a person may, under peculiar circumstances, be without constructive notice of particular documents, which are actually in the custody of himself or his agent; as where they were passed over amongst many title deeds, or were in a box, thought to contain only immaterial writings. But it must of course be sworn positively that there was no notice or apprehension of their presence by the person holding them or his agent (*c*).

The custody
of a client's
title deeds by
his solicitor
is not
notice of an
incumbrance
in favour of
solicitor.

1104. There is nothing in the possession, by a solicitor, of his client's title deeds, which makes inquiry necessary (*d*) on the part of any one dealing for an interest in the estate; such a possession being in the ordinary course of business, is, on the contrary, so little regarded as evidence of any interest beyond that conferred by the character of solicitor, that a solicitor ought to give notice of any further interest, which he may acquire by contract, to the persons in the visible ownership of the property.

Onus of
proof of
notice.

1105. The onus lies on a person who claims priority over another on the ground that he took with notice of an earlier security, to prove that he had such notice; and it is not sufficient in such a case merely to show that the deeds were in the hands of the earlier incumbrancer if, irrespective of the security, he was the person entitled to hold them (*e*).

Underwriters
notice of
broker's lien.

1106. Underwriters have notice of the insurance brokers' lien for commission on the policy (*f*).

(*z*) *Greenslade v. Dare*, 20 Beav. 284.

(*a*) *Cator v. Pembroke*, 1 Bro. C. C. 301; and see (V. & P. 879, ed. 11) Lord St. LEONARDS' observations on *Davies v. Thomas*, 2 Y. & C. Ex. 234; but observe that there seems to have been other notice in that case (1096).

(*b*) *White v. Wakefield*, 7 Sim. 401.

(*c*) *Earl of Portsmouth v. Lord Effingham*, 1 Ves. Sen. 430; and *Jacobson's Case*, cited 1 Ves. Sen. 435.

(*d*) *Bozon v. Williams*, 3 Y. & J. 150.

(*e*) *Exp. Hardy*, 2 Deac. & C. 393.

(*f*) *Gibson v. Overbury*, 7 Mee. & W. 555.

SECTION IV.

Paragraph
1107

Constructive Notice by Tenancy.

	PARAGRAPH
<i>Notice of tenancy is notice of tenant's interest</i>	1107
<i>Quære whether notice of tenancy is notice of future estate of tenant</i> .. .	1108

1107. Notice also arises from the fact, that a person other than the apparent owner of a corporeal hereditament, is in actual occupation or receipt of the rents of the estate; viz., notice to the purchaser (*g*), as between him and the occupier, and also as between him and the owner of whatever interest the occupier, or the person from whom he holds, may have acquired in the property; and extending to the actual interest which the occupiers may have as tenants or otherwise, or as between themselves; whether that interest be founded upon the contract under which he is in possession, or upon an independent and subsequent contract (*h*). Moreover, as the principle of the doctrine is (*i*), that the purchaser is not justified in assuming the possession of the occupier to be that of the apparent owner, but is bound to inquire into the nature of his interest, the notice equally arises, whether the property be described to the purchaser as occupied by the person alone who claims the interest in question, or by him and his under tenants (*k*). If, however, the person in possession be not the original lessee, and have no knowledge of the matter contained in the original lease, the purchaser is not bound (*l*) to go further, or to pursue his inquiries through every derivative lessee, until he arrives at the holder of the original lease. Neither does the obligation to inquire extend (*m*) to the interest of the last occupier, where the possession is vacant. Therefore, where property was described as "late in the occupation of A.," the purchaser was held not to have notice, that another person claiming through A. had acquired an interest in the land. And the purchaser will have no notice (*n*) of any interest in the tenant, the existence of which he by his own act has negatived. It was so held, as to the tenant's lien as vendor for part of the purchase-money, the receipt of which he had acknowledged both in the body of the purchase deed, and by an indorsement thereon.

(*g*) *Taylor v. Stibbert*, 2 Ves. Jun. 437; *Daniels v. Davison*, 16 Ves. 249; *Powell v. Dillon*, 2 Ba. & Be. 416; *Barnhart v. Greenshields*, 9 Moo. P. C. 18, 32; *Knight v. Bowyer*, 23 Beav. 609; *James v. Litchfield*, L. R. 9 Eq. 51; *Holmes v. Powell*, 8 De G. M. & G. 572; *Mumford v. Stohwasser*, L. R. 18 Eq. 556; *Popple v. Prideaux*, cited 3 Myl. & K. 707. See *Oxwick v. Plumer*, Bac. Abr. Mort. E. s. 3; and observations thereon in *Barnhart v. Greenshields*, 9 Moo. P. C. 18.

(*h*) *Allen v. Anthony*, 1 Mer. 282; *Cavander v. Bulleel*, L. R. 9 Ch. 79.

(*i*) *Bailey v. Richardson*, 9 Hare, 734; and see *Crofton v. Ormsby*, 2 Sch. & Lef. 597.

(*k*) *Bailey v. Richardson*, 9 Hare, 734.

(*l*) *Hanbury v. Litchfield*, 2 Myl. & K. 629.

(*m*) *Miles v. Langley*, 1 Russ. & Myl. 39, affirmed 2 Russ. & Myl. 626.

(*n*) *White v. Wakefield*, 7 Sim. 401.

Paragraphs
1108—1110

Quære
whether
notice of
tenancy is
notice of
future
estate of
tenant.

1108. It was considered where the agreement, under which the occupier claimed a further interest, did not confer upon him a title in possession (so that he could not on the strength of the agreement have resisted or been relieved against an ejectionment, or have rightfully refused to give up possession of the estate), that the purchaser was not affected with notice (*o*). The learned judge by whom this case was decided, appears rather to have aimed at an escape from the case of *Daniels v. Davison* (*p*), of which it has been more than once said, that it carries this branch of the doctrine of notice to its fullest extent. It may, however, be difficult to reconcile the decision with the principle upon which that doctrine is said to be founded, viz. (*q*) that the purchaser may not assume the possession of the tenant to be that of the person who claims to be owner. The principle of the decision in *Penny v. Watts* (*o*), makes the question dependent, not upon what the purchaser may properly assume, but upon the nature of the interest which the tenant may chance to possess beyond his mere tenancy.

SECTION V.

Constructive Notice of Records.

	PARAGRAPH
<i>Acts of Parliament</i>	1109
<i>Court rolls</i>	1110
<i>Registration of deeds, etc.</i>	1111
<i>Intention of Registry Acts to protect purchasers without notice</i>	1112
<i>Lis pendens</i>	1113
<i>Notice of judgment</i>	1114
<i>Lis pendens must be kept alive</i>	1115
<i>What property and interest bound by lis pendens</i>	1116
<i>A decree puts an end to a lis pendens</i>	1117
<i>Circumstances in which lis pendens will not be notice</i>	1118
<i>Date from which lis pendens takes effect</i>	1119
<i>Act of Bankruptcy</i>	1120

Acts of
Parliament.

1109. Acts of Parliament of a private nature are not (as public Acts are) notice to bind all the world, even when they are expressly declared to be public Acts (*r*).

Court rolls.

1110. It appears to be now settled, that a purchaser of copyholds is not bound to search the rolls of the manor of which they are held; and the rolls are, in consequence, not of themselves

(*o*) *Penny v. Watts*, 2 De G. & Sm. 501. This case was not affirmed on appeal; but the doctrine above stated remains untouched by the judgment of the Lord Chancellor, who thought it not proper to be discussed; see 1 Mac. & G. 150.

(*p*) *Daniels v. Davison*, 16 Ves. 249.

(*q*) See *Bailey v. Richardson*, 9 Hare, 734.

(*r*) *Hesse v. Stevenson*, 3 Bos. & P. 565; per Lord HARDWICKE, *Earl of Pomfret v. Lord Windsor*, 2 Ves. Sen. 486.

notice of their contents (s); though it was formerly held otherwise (t). Paragraphs
1110—1111

But it seems that persons who deal with copyhold tenants, ought to inform themselves as to the existence of any customs of the manor which may affect their interests. So that a subsequent incumbrancer of copyholds who had searched the rolls was nevertheless bound by a prior incumbrance not entered thereon (u); there being by the custom of the manor, no time limited for presenting surrenders made out of court. And it has been held, that persons who contract for a lease, ought to ascertain the custom of the manor as to the length of the leases (x). We have seen that even searching the roll will not protect a purchaser who neglects to inquire for the copies of court roll (y) (1100).

1111. It is said to have been the original object of Registration Acts, that the register should be notice to everybody (z), and that the order of registration should be the order of priority (a); but, with the exception hereafter to be noticed as to priority, a different construction has been put upon them. The register, it is well settled, is not notice to *puisne* incumbrancers (b) of earlier registered charges; and much less is it notice to the mortgagor, of an assignment of the mortgage (c). The reason (d) why it is not considered notice is, that if it were so, it would be also constructive notice of everything contained in the memorial, and, therefore, of every instrument or fact recited in it, after which the incumbrancer would be bound to inquire. It would also be notice (if such were the fact), that the deed was unduly registered; in which case it would have no preference, and so the provisions of the Act for complying with its requisitions would be avoided. Registration
of deeds, etc.

The register is also not of itself notice in Ireland (e), although, from the peculiar wording of the Irish Act, the effects of registration, as we shall see in considering its bearing upon priorities (1266) is very different. An incumbrancer who has notice of a registered deed is bound by matters contained in the deed, though not noticed in the memorial (f).

(s) *Bugden v. Bignold*, 2 Y. & Coll. C. C. 377.

(t) *Pearce v. Newlyn*, 3 Mad. 186. (u) *Horlock v. Priestly*, 2 Sim. 75.

(x) *Hanbury v. Litchfield*, 2 Myl. & K. 629.

(y) *Whitbread v. Jordan*, 1 Y. & C. Ex. 303.

(z) *Hine v. Dodd*, 2 Atk. 275. (a) *Ford v. White*, 16 Beav. 120.

(b) *Cator v. Cooley*, 1 Cox. 182; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Wiseman v. Westland*, 1 Y. & J. 117. In *Kettlewell v. Watson*, (21 Ch. D. at p. 703), FRY, J., is reported to have said that registration was not notice to all the world of the receipt of the purchase-money, because the memorandum does not state the receipt; but in fact it is not notice at all.

(c) *Williams v. Sorrell*, 4 Ves. 389.

(d) *Bushell v. Bushell*, *supra*; *Latouche v. Lord Dunsany*, 1 Sch. & Lef. 137.

(e) *Bushell v. Bushell*, 1 Sch. & Lef. at p. 103; *Underwood v. Lord Courtown*, 2 Sch. & Lef. 41; *Pentland v. Stokes*, 2 Ba. & Be. 75.

(f) *Rochard v. Fulton*, 1 Jo. & Lat. 413.

Paragraphs
1112—1113

Intention of
registry Acts
to protect
purchasers
without
notice.

1112. The intention of the Middlesex and Irish Registry Acts was to protect persons without notice; and not to enable persons, who take with notice of a prior unregistered deed, to gain preference over it by registering their own (*g*) (**1266**).

The Act of 18 & 19 Vict. c. 15, s. 12, which provides for the registration of annuities, is in *pari materia*, and has received a like construction (*h*).

The Yorkshire Registry Act of 1884, however, makes even actual notice immaterial in the absence of fraud (**1266—1268**). Against a person who is admitted generally, or proved to have searched the register, either for a deed (*i*) or a judgment (*k*), notice will be presumed of so much of its contents as affects his interests; yet, as he is not bound (*l*) to search, (unless he omitted to do so wilfully to avoid notice), he will not be affected by constructive notice of a registered instrument, if it be shown that his search did not extend to that part of the register in which it was contained (*m*).

Lis pendens.

1113. The effect of a *lis pendens* upon the title of a purchaser is analogous to that produced by notice of a title or equity inconsistent with the title of the person from whom he purchases. But the doctrine of *lis pendens* was always common to courts both of law and equity (*n*), and depends not upon the principles of constructive notice, but upon the consideration already mentioned, that no action or suit could be successfully terminated if alienations *pendente lite* were allowed to prevail. But while, pending the suit, the defendant is thus prevented from affecting by alienation the rights of the plaintiff, and the plaintiff from alienating to the injury of the defendant, where the latter may in the result have a right against him, the rule will not apply to the right of a person who, *pendente lite* and without notice, acquires from a defendant an interest in the litigated property which is affected by the equitable claim of a co-defendant, although the interest appear on the face of the proceedings; provided it be not in question in the suit or a subject of adjudication between the co-defendants; there being generally no decree, and consequently no *lis pendens*, between such parties (*o*). Where such an adjudication was made (*p*) in an administration suit, to which two devisees of separate estates were defendants, by a

(*g*) *Le Neve v. Le Neve*, 3 Atk. 646; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Ford v. White*, 16 Beav. 120; *Lee v. Green*, 2 Jur. (N.S.) 170.

(*h*) *Greaves v. Tofield*, 14 Ch. D. 563.

(*i*) *Hodgson v. Dean*, 2 Sim. & St. 221; *Ford v. White*, 16 Beav. 120.

(*k*) *Proctor v. Cooper*, 2 Drew. 1 (affirmed 1 Jur. (N.S.), 149).

(*l*) *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Lane v. Jackson*, 20 Beav. 535.

(*m*) *Hodgson v. Dean*, 2 Sim. & St. 221.

(*n*) So, however, was constructive or implied notice. (Co. Litt. 309 b.; *Tooker's Case*, Dyer, 302.)

(*o*) *Bellamy v. Sabine*, 1 De G. & J. 566.

(*p*) *Tyler v. Thomas*, 25 Beav. 47.

decree for the sale of one of the estates, without prejudice to the right of the devisee of it to contribution against the other, a mortgagee of the latter estate was held to be affected by the *lis pendens*. Paragraphs 1113—1116

1114. The law as to the notice created by judgments of the superior courts, decrees in equity, rules of courts of common law, and orders in bankruptcy and lunacy, have not been altogether put upon the same footing with *lis pendens*. The operation of the latter has been limited, so that whereas it was formerly binding (*q*) of itself, except in cases of collusion (*r*), it now binds no purchaser or mortgagee without express notice of it, unless it be duly registered (*s*) (**503**). On the other hand, decrees (*t*) and judgments (*u*), which (although docketed (*x*) were (*y*) not formerly notice of themselves, and though not docketed, affected a purchaser having express notice), now require registration to make them effectual (*z*), even where there is express notice (*a*) of them *aliunde*, are still not made notice by force of the register, and are in fact not notice unless it be shown that the register was searched (*b*). Notice of judgments.

Lis pendens, then, is still of itself binding, if duly registered ; and whether registered or not, a purchaser is affected by express notice of it. But judgments and decrees are not notice of themselves, although registered ; yet, unless they be registered, a purchaser is not affected even by express notice of them.

1115. It is laid down (*c*), that where a man is to be affected by *lis pendens*, there ought to be a close and continued prosecution of the suit ; or, as has been said, something should be done to keep it alive, and in activity (*d*). *Lis pendens* must be kept alive.

1116. The effect of *lis pendens* extends to any interest in land and possibly money in court (*e*) directly in question in the suit ; but not any other kind of personal estate except leaseholds (*e*). What property and interests bound by *lis pendens*.

(*q*) Tothill, 45 ; Worsley v. Earl of Scarborough, 3 Atk. 392 ; Walker v. Smalwood, Ambl. 676 ; Self v. Madox, 1 Vern. 459 ; Moore v. M'Namara, 2 Ba. & Be. 186 ; Flemming v. Page, Finch. 320.

(*r*) Culpeper v. Aston, 2 Ch. Ca. 115.

(*s*) 2 & 3 Vict. c. 11, s. 7.

(*t*) Tothill, 45 ; Worsley v. Earl of Scarborough, *supra* ; Rivers v. Steele, Mr. Cox's MS. 1 Vern. 286, Linc. Inn Liby. ; notwithstanding Sorrell v. Carpenter, 2 P. Wms. 482 ; Searle v. Lane, 2 Vern. 37 and 88 ; and other early cases ; and see Sugd. V. & P. 760, ed. 14 ; see also Giffard's case, Freem. Ch. App. 310, ed. 2 ; and as to express notice, Harvey v. Montague, 1 Vern. 57 and 122.

(*u*) Churchill v. Grove, Nels. 89 ; Snelling v. Squib, 2 Ch. Ca. 47 ; Greswold v. Marsham, 2 Ch. Ca. 170.

(*x*) MSS. Notes, 2 Eq. Ca. Abr. 682, D. d.

(*y*) Davis v. Strathmore, 16 Ves. 419.

(*z*) 1 & 2 Vict. c. 110, s. 19 ; 2 & 3 Vict. c. 11, s. 4.

(*a*) 3 & 4 Vict. c. 82, s. 2 ; 18 & 19 Vict. c. 15, s. 4.

(*b*) Procter v. Cooper, 2 Drew. 1 (affirmed 1 Jur. (N.S.) 149).

(*c*) Bishop of Winchester v. Paine, 11 Ves. 194 ; Beame's, Ord. 7 ; Preston v. Tubbin, 1 Vern. 286.

(*d*) Kinsman v. Kinsman, 1 Russ. & Myl. 617.

(*e*) Wigram v. Buckley, [1894] 3 Ch. 483.

Paragraphs 1116—1117 It therefore binds the assignee of an equity of redemption, assigned during the suit; and the purchaser from an heir at law, pending a suit to establish the will of an ancestor, as well as the assignee of the alleged devisees (*f*). And the assignee is as much affected where the contract was entered into before the commencement of the suit, as where it was both entered into and completed after that period (*g*).

But it merely binds as to the claim which is the subject of the suit, and does not of itself create an incumbrance, where the claim being invalid could create none (*h*). Nor will it, either in the case of real or personal estate, stop trustees or executors from carrying out their trusts (*i*). A suit, therefore, for a general account of personal, or of real and personal estate, both consisting of various parts, where there is no dispute about the title, and no receiver has been appointed, nor injunction granted to restrain dealing with the property, will not affect the title of a purchaser from a devisee or executor. But in the case of a suit, charging a particular estate with a particular trust, it is otherwise (*k*). And where the life estate of an executor in lands subject to a judgment, was liable in equity to recoup assets of the testator, which by the executor's default had become applicable to discharge the judgment, it was held (*l*), that a suit by the judgment creditor for an account of the testator's real and personal estate and payment of his debts, did affect a mortgagee of the executor *pendente lite*; the security not being a step taken in execution of the trust.

Lis pendens does not apply to any fact, or equity arising out of a fact, which is not asserted in or does not appear by the suit. So that a suit (*m*) to carry out the trusts of a deed by which a legacy passed by general assignment, but wherein no specific claim is made to the legacy, is not notice of the assignment. So, where the matter, though connected with, is merely collateral to the question in the cause. Therefore, if the cause relate to a right to money, which is secured upon an estate, but not to the estate itself, a purchaser of the estate pending that suit is not affected (*n*).

A decree puts an end to a *lis pendens*. **1117.** It was stated above, that a decree was no notice of itself; but this applies only to decrees which put an end to the *litis*

(*f*) *Garth v. Ward*, 2 Atk. 175.

(*g*) *Norris v. Lord Dudley Stuart*, 16 Beav. 359.

(*h*) *Bull v. Hutchens*, 32 Beav. 615.

(*i*) *Walker v. Flamstead*, 2 Kenyon, part 2, 57; *Berry v. Gibbons*, L. R. 8 Ch. 747.

(*k*) *Walker v. Flamstead*, *supra*.

(*l*) *Jennings v. Bond*, 2 Jo. & Lat. 720. See *Drew v. Earl of Norbury*, 3 Jo. & Lat. 267.

(*m*) *Houlditch v. Wallace*, 5 Cl. & Fin. 629; *Holt v. Dewell*, 4 Hare, 446. And in general a suit which cannot be brought to a hearing, cannot properly create a *lis pendens*, so as to affect a purchaser claiming under one of the parties after filing the bill. (Per Lord HARDWICKE, *Garth v. Crawford*, Barn. Ch. R. at p. 454.)

(*n*) *Worsley v. Earl of Scarborough*, 3 Atk. 392.

contestatio. A decree which is not final (as a decree to account which puts no end to the matters in question), binds (o), as *lis pendens*. And it was held, that where, after a decree to account, a report had been made and confirmed, all the equities adjusted, and everything obtained under the decree which had been contemplated in the suit, and upwards of a quarter of a century had elapsed since the decree, though no general decree had been made on further directions, a purchaser was not (p) affected by a continuing *lis pendens*,— the *litis contestatio* necessary to constitute *litis pendencia* being substantially at an end. Paragraphs 1117—1118

The opinion of Lord *Redesdale* (q), that a transaction done after the dismissal of a bill, is still *pendente lite*, because it may still be a question on appeal to the Lords whether the bill was rightly dismissed, and that the parties, therefore, take subject to all the legal and equitable consequences of the transaction, is dissented from, by Lord *St. Leonards* (r), as too great an extension of the doctrine. It may be observed, with respect to appeals from the court below, either to a superior jurisdiction there, or to the House of Lords, that an order for an appeal seems not to be a continuation of the *lis pendens*, because, as a general rule, the appeal puts no stop to the proceedings under the decree (s). The *litis contestatio* is assumed to be at an end, until the decree is varied or reversed. And the same practice prevails in the House of Lords (t), which seems to be a strong argument against the continuation of the *lis pendens* during the appeal. Of course, if the registration be allowed to drop during the period allowed for appeal, the question will not arise.

1118. A purchaser for valuable consideration was not formerly affected by a suit by one claiming under a *voluntary* settlement by the same owner, praying an execution of the trusts of the settlement (u), but it is conceived that he would be under the Voluntary Conveyances Act, 1893. Neither will *lis pendens* affect any particular person with notice of a fraud (x), unless there were special notice of the title in dispute to that person. Whether it will postpone a registered conveyance or not, seems, on the authorities, to be doubtful. In one case (y) it was said that actual notice, clearly proved, was alone sufficient for that purpose ; but in a later case (z) (where Circumstances in which *lis pendens* will not be notice.

(o) *Id.* ; *Higgins v. Shaw*, 2 Dru. & War. 356.

(p) *Kinsman v. Kinsman*, 1 Russ. & Myl. 617.

(q) *Gore v. Stacpoole*, 1 Dow. 18.

(r) V. & P. 768, ed. 14.

(s) Rules, 1883, Ord. LVIII. r. 16.

(t) House of Lords' Journals, 46, p. 338, 47 Geo. 3 ; and see *Waldo v. Caley*, 16 Ves. 206.

(u) *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180.

(x) *Per* Lord HARDWICKE, *Mead v. Orrery*, 3 Atk. at p. 243.

(y) *Per* Sir William Grant, *Wyatt v. Barwell*, 19 Ves. at p. 439.

(z) *Jennings v. Bond*, 2 Jo. & Lat. 720.

Paragraphs the former was not cited) *Sugden*, L.C., held that registration of the
 1118—1120 deed did not affect the question.

Date from
 which *lis*
pendens takes
 effect.

1119. *Lis pendens* formerly took effect when the bill was filed by relation from the service of the subpoena (*a*). It is considered that it will now take effect from the service of the writ, when the action has been registered under the statute.

Against a *bona fide* purchaser for full value and without actual notice, the effect of *lis pendens* has been thought so hard that no help was given by equity to the plaintiff to cure defects in the proof of his title (*b*). But since the Judicature Act, this would seem to be of mere historical interest (**1059**).

Act of
 bankruptcy.

1120. An act of bankruptcy is not of itself notice (*c*).

(*a*) *Anon.*, 1 Vern. 318.

(*b*) *Sorrell v. Carpenter*, 2 P. Wms. 482.

(*c*) *Wilkes v. Bodington*, 2 Vern. 599.

CHAPTER III.

Of Priority conferred by the Possession of the Legal Estate.

	PARAGRAPH
Section I.—Protection afforded by the Legal Estate generally and herein of Defective Assurances	1121—1132
„ II. Tacking of Securities as against Mesne Incumbrancer	1133—1159
SUB-SECT. (1).—RIGHT TO TACK DEPENDS ON POSSESSION OF OR DOMINION OVER A PRIOR LEGAL ESTATE	1133—1145
„ (2).—THE DEBT TO BE TACKED MUST CONSTITUTE A SPECIFIC CHARGE ON THE PROPERTY	1146—1151
„ (3).—BOTH SECURITIES MUST BE HELD IN THE SAME RIGHT	1152
„ (4).—THE SUBSEQUENT SECURITY MUST HAVE BEEN CREATED AND ACQUIRED BY THE PARTY DESIRING TO TACK WITHOUT NOTICE OF THE MESNE INCUMBRANCE	1153—1158
„ (5).—AS TO THE TIME OF ACQUIRING THE DEBT PROPOSED TO BE TACKED ..	1159
„ III. Tacking as against the Mortgagor himself and persons claiming through him other than Mesne Incumbrancers	1160—1167

SECTION I.

Protection afforded by the Legal Estate generally and herein of Defective Assurances.

<i>Protection afforded by the legal estate</i>	1121
<i>Mere negligence may postpone legal mortgagee</i>	1122
<i>A defective legal mortgage good as against mortgagor and his trustees and judgment creditors but not as against subsequent legal mortgagees without notice</i>	1123
<i>Where mortgagor's title defective and afterwards made good</i>	1124
<i>Effect of mortgagor's covenant for further assurance in relation to defective title</i>	1125
<i>Security not defective because mortgagor thought he had a smaller estate than he really had</i>	1126
<i>Defective mortgages by tenants in tail</i>	1127
<i>Effect of bankruptcy of tenant in tail on voidable estates created by him ..</i>	1128
<i>How far acts of bankrupt tenant in tail are void as against the trustee ..</i>	1129
<i>Judgment debtor may be ordered to bar entail</i>	1130
<i>Equitable mortgages of ships</i>	1131
<i>How questions as to defective assurances settled</i>	1132

1121. It is an established general rule, that a mortgagee who Protection has the legal estate, shall prevail before all other mortgagees and afforded by

Paragraph
1121

the legal
estate.

incumbrancers of whose securities he had no notice when his mortgage was made (a). Therefore, a *puisne* mortgagee, without notice of a prior mortgage, who acquires a legal title by getting in an outstanding term, may recover the land in an action against the first mortgagee; and if the owner of the equitable fee mortgages and afterwards acquires the legal estate, and mortgages again without notice, the last mortgagee shall prevail (b). Indeed it is a general and well established rule, that where the equities are equal, the legal title prevails; and the rule applies in favour of an equitable incumbrancer for value without notice of prior equitable interests, who subsequently gets in the legal estate unless there are circumstances which make it inequitable for him so to do: *e.g.* where at the time of getting it in he has notice that it is held by an express trustee who is committing a breach of trust in parting with it to him (c).

This principle is well exemplified by the case of *Taylor v. London and County Banking Co.* (c). There a solicitor being mortgagee of property in his own right and also trustee of two trust funds B. and T. first secretly appropriated the mortgage in his books to answer misappropriations of fund B. Subsequently on the appointment of a new trustee of fund T. (which he had also misappropriated) he represented that the mortgage was one of the securities for that fund and legally transferred it to himself and the new trustee jointly. Still later suppressing the previous transfer he deposited the mortgage with his bankers to secure his own overdraft and gave them a power of attorney to transfer the legal estate to themselves which they purported to do *after discovering the fraud*. Under these circumstances it was held by the Court of Appeal that fund T. took priority of both fund B. and the bank. For although by the transfer to the bank the joint tenancy of the T. trustees had been severed, yet, *qua* one moiety, the legal estate remaining in the innocent trustee gave that trust priority, and, *qua* the other moiety, the bank got it in with knowledge that the transfer to themselves under the power of attorney, given by the fraudulent trustee, was a breach of trust. Mere delay in completing his legal title, whereby a subsequent incumbrancer has obtained a *quasi* legal title, is not of itself sufficient, *e.g.* delay in the inrolment of a conditional surrender of

(a) *Bac. Abr. Mortg. E. 3.* As, in this respect, equity followed the law, the rule is not affected by the Judicature Act, 1873, s. 25 (11). *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555. *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231; *Pilcher v. Rawlins*, L. R. 7 Ch. 259; *Heath v. Crealock*, L. R. 10 Ch. 22, 33, and see *London Freehold and Leasehold Property Co. v. Suffield*, [1897] 2 Ch. 608, which was not a question of priority, but the same principle was applied.

(b) *Goodtitle v. Morgan*, 1 T. R. 755; *Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278.

(c) *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231; *Bailey v. Barnes*, [1894] 1 Ch. 25; *Taylor v. Russell*, [1892] A. C. 244.

copyholds till after the inolment of the security of a later incumbrancer, who was without notice (*d*).

Paragraphs
1121—1123

1122. The protection afforded by the legal estate has in some cases been considered so great that the court has refused to postpone a *legal* mortgagee (as it will an equitable one (*e*)), to a subsequent equitable one, on the ground of any mere carelessness, or want of prudence. It has been said that the conduct necessary to deprive a legal mortgagee of his priority over a subsequent equitable one, must be such as to amount to assistance in or connivance at a fraud leading to the creation of the subsequent equitable incumbrance, (*f*) of which assistance or connivance, the omission to use ordinary care in inquiring after, or keeping title deeds, may be sufficient evidence where such conduct cannot be otherwise reasonably explained. But this statement appears to be too broad; and it has been decided by Parker, J., in a case (*g*) in which all the authorities are elaborately reviewed, that “any conduct on the part of the holder of the legal estate in relation to the deeds which would make it inequitable for him to rely on his legal estate against a *prior* equitable estate of which he had no notice, ought also to be sufficient to postpone him to a *subsequent* equitable estate the creation of which has only been rendered possible by the possession of deeds which, but for such conduct, would have passed into the possession of the holder of the legal estate.” For instance, where a person purchases property without requiring an abstract or production of the deeds he will certainly be postponed to a *prior* equitable mortgagee (*f*), and it would seem to follow that where he carelessly allows the mortgagee to retain them, (or even the conveyance only,) he will not be allowed to rely on his legal estate. A legal mortgagee will, anyhow, be postponed where he has made the mortgagor his agent, with authority to raise money, and the mortgagor has fraudulently represented that the property is unincumbered (*h*).

Mere negligence may postpone legal mortgagee.

1123. If a mortgage, valid in equity, be defective as to its intended legal operation, equity will make good the defect against the mortgagor; and will give the mortgagee priority as against those who stand in the place of, *and take subject to, the same equities as the mortgagor* (*i*). But no relief will be given to a

A defective legal mortgage good as against mortgagor and his heirs and judgment creditors, but not as against subsequent legal mortgagees without notice.

(*d*) *Horlock v. Priestley*, 2 Sim. 75; and see also *Collis v. Hibernian Bank*, 31 L. R. Ir. 261.

(*e*) *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1; *Farrand v. Yorkshire Banking Co.*, 40 Ch. D. 182.

(*f*) *Oliver v. Hinton*, [1899] 2 Ch. 264, and conf. *Cotley v. National Provincial Bank of England*, 20 T. L. R. 607.

(*g*) *Walker v. Linom*, [1907] 2 Ch. 104.

(*h*) *Northern Counties, etc., Insurance Co. v. Whipp*, 26 Ch. D. 482; *Manners v. Mew*, 29 Ch. D. 725; *Joseph v. Webb*, 1 Cab. & El. 262; *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352; *Atherley v. Barnett*, 52 L. T. 736; and see and dist. *Lloyds Banking Co. v. Jones*, 29 Ch. D. 221; *Garnham v. Skipper*, 55 L. J. Ch. 263; and *Walker v. Linom*, *supra*.

(*i*) *Taylor v. Wheeler*, 2 Vern. 565.

Paragraphs prior mortgagee or judgment creditor, where the subsequent
 1123—1126 security is a mortgage duly executed without notice of the other, for the later mortgagee has then as good an equity as the earlier one, and a better than a judgment creditor, as having lent his money on the land, and *has a legal title also, not to be overturned in equity by a defective security incapable of prevailing at law (k).*

So where copyhold lands, subject to a covenant to surrender, made for valuable consideration, were afterwards surrendered to a mortgagee without notice of the former covenant, the surrenderee was not postponed (l); for he had a legal title, and an equal equity.

And where all the interests are equitable and the first defective, no help will be given against the later incumbrance. Therefore, where a recognizance, the time for the inrolment of which had elapsed, had been inrolled by special order, which gave it effect from its date, preference was given (m) to a judgment creditor after the date, but before the inrolment of the recognizance; in regard that the estate being subject to a legal mortgage, it could be reached by neither security without the aid of equity (n). And in another case (o) it was said, that the court always gave leave to inrol a recognizance after the proper time, with caution, so as not to prejudice any intervening purchaser.

Where mortgagor's title defective and afterwards made good.

1124. If the mortgagor's title be altogether defective, and he afterwards acquire a good title, the new title may be applied to make good the defective conveyance (p). But a mortgagee cannot better a defective security by paying off another charge, though he will be allowed what he has paid (q).

Effect of mortgagor's covenant for further assurance in relation to defective title.

1125. The mortgagor's covenant for further assurance does not oblige him to release his equity of redemption, but only to make such assurance as will support the mortgage (r).

1126. Where all the actual interests of the conveying parties have clearly passed by the deed, the security will be supported,

(k) *Burgh v. Francis*, 1 Eq. Ca. Abr. 320 & Bac. Abr. Mort. E. 3. But where a person sold as heir at law, not being so, and afterwards the estate descended on him, and he died, not having confirmed the title, EYRE, C.B., thought that though the conveyance could have been made good against him, the equity was personal, and could not be enforced against the heir. But the bill was dismissed on other grounds. (*Morse v. Faulkner*, 1 Anst. 11.)

(l) *Oxwick v. Plumer*, Bac. Abr. Mortg. E. 3; and mentioned 2 Vern. 636.

(m) *Fothergill v. Kendrick*, 2 Vern. 234; and see *Brown v. Jones*, 1 Atk. 188.

(n) For which the maximum *Actus curiæ nemini facit injuriam* might have been relied upon.

(o) *Bothomley v. Fairfax*, 2 Vern. 750.

(p) *Smith v. Baker*, 1 Y. & Coll. C. C. 223; *Taylor v. Debar*, 1 Ch. Ca. 274; *Seabourne v. Powell*, 2 Vern. 11; see *per* Lord CRANWORTH, C., *Smith v. Osborne*, 6 H. L. C. at p. 390.

(q) *Exp. Mutton, Re Cole*, L. R. 14 Eq. 178.

(r) *Atkins v. Uton*, 1 Lord Raym. 36.

though the nature of the parties' interests was misunderstood. Thus, where there was a mortgage under the Fines and Recoveries Act, by persons supposing themselves to be tenant for life and tenant in tail, the deed being sufficient to pass all their interests, and effectual to bar estates tail, the heir of the supposed tenant for life was not allowed (s) to set up a title on the ground that his ancestor, being in fact tenant in tail, the deed had miscarried.

Paragraphs
1126—1128

Security not defective because mortgagor thought he had a smaller estate than he really had.

1127. Defective assurances by tenants in tail have been the subject of modern legislation ; prior to which, however, if a tenant in tail, either in possession or remainder (t), had made a disposition or created an estate voidable by the issue (u) ; yet, if he afterwards levied a fine, or suffered a recovery (though to a subsequent mortgagee or purchaser, or for a different purpose), the first operation of the fine or recovery was to give effect to the antecedent act, even against the subsequent declaration of the tenant in tail. The fine worked a confirmation, whether the prior instrument were a legal conveyance or an equitable charge (x). But not, it is said (y), where, the prior charge being equitable, a legal interest was afterwards conveyed to the subsequent purchaser or mortgagee without notice of the prior charge.

Defective mortgages by tenants in tail.

And so now by statute (z), where a voidable estate is created by a tenant in tail of lands under a settlement, in favour of a purchaser for valuable consideration, a subsequent disposition by the tenant in tail of the same lands (except by certain leases, s. 41), whatever its object, and whatever the extent of the estate intended to be created, will if made with the consent of the protector of the settlement, where there is one, confirm the voidable estate to its full extent. But if the protector do not consent, the voidable estate will be confirmed only so far as the tenant in tail could confirm it without the protector's consent (a). In either case, the voidable estate will not be confirmed as against the person who takes under the subsequent disposition, or those claiming under him, where he is a purchaser for valuable consideration without *express* notice of the voidable estate.

1128. And in case of the bankruptcy of the tenant in tail, it is provided (b), that a voidable estate created in favour of a purchaser for valuable consideration, by an actual tenant in tail, or by a tenant

Effect of bankruptcy of tenant in tail, or void.

(s) *Evans v. Jones*, Kay, 29.

(t) Anon. Freem. Ch. Cas. 310.

(u) *Machell v. Clarke*, 2 Raym. 778 ; *Tyrrell v. Mead*, 3 Burr. 1705.

(x) *Hunt v. Gatler*, Poph. 5 ; *S. C. sub. nom. Capel's Case*, 1 Co. 54 ; *Tourle v. Rand*, 2 Bro. C. C. 649 ; *Tyrrell v. Mead*, *supra* ; *Lloyd v. Lloyd*, 4 Dru. & War. 354 ; *Beck v. Walsh*, 1 Wils. 276 ; *Hankey v. Martin*, 49 L. T. 560.

(y) *Powell*, Mort. 165, 166.

(z) 3 & 4 Will. 4, c. 74, s. 38.

(a) See *Hankey v. Martin*, *supra*.

(b) 3 & 4 Will. 4, c. 74, s. 62 ; Bankruptcy Acts, 1869, s. 25 (4) ; 1883, s. 56 (5).

Paragraphs
1128—1129

able estates
created by
him.

in tail entitled to a base fee who shall afterwards become bankrupt, shall be confirmed by the subsequent disposition of the trustee to its full extent, as against all persons except those whose rights are saved by the Act, if there shall be no protector, or being one, if he shall consent to the disposition. This is so whether the trustee may have made a previous statutory disposition or not, or whether a prior sale or conveyance shall have been made or not, under prior or subsequent Bankruptcy Acts ; but to the extent only to which the actual tenant in tail before his bankruptcy could have confirmed the voidable estate, without the consent of the protector, where (in the case of an actual tenant in tail) there shall be a non-consenting protector. The voidable estate shall also be confirmed to its full extent, against all persons except those whose rights are saved by the Act, where at any time after the trustee's disposition, whilst only a base fee shall be subsisting, there shall cease to be a non-consenting protector.

And in all these cases also, the voidable estate shall not be confirmed as against the person who takes under the subsequent disposition of the trustee, or those claiming under him, where he is a purchaser for valuable consideration without *express* notice of the voidable estate.

How far acts
of bankrupt
tenant in
tail are void
as against
the trustee.

1129. The acts of the bankrupt tenant in tail are void as against the disposition of the bankruptcy trustee, where they would have been void against the creditors if the bankrupt had been seised in fee : but the bankrupt's powers of disposition remain in him, subject only to the powers of the trustee and the rights of all persons claiming under him. And the trustee's disposition of the lands of a bankrupt, being actual tenant in tail, or tenant in tail entitled to a base fee, will be as valid and effectual when the bankrupt is dead, as when he is living at the time of the disposition, in case at the time of his death there shall be no protector of the estate tail or base fee, or in case (where the bankrupt was actual tenant in tail) there shall be issue inheritance, and no protector or a consenting or non-consenting protector ; or in case (where the bankrupt was tenant in tail entitled to a base fee) there shall be issue, who, if the base fee had not been created, would have been actual tenant in tail, and either no protector or a consenting protector of the settlement (c). The court has refused, in a suit for specific performance of a covenant for further assurance, to compel the bankrupt to exercise the power of disposition reserved to him by s. 64, by enlarging the estate conveyed by the mortgage, and so barring the estate of other persons than the grantor, where there was no special contract to do so (d).

(c) 3 & 4 Will. 4, c. 74, ss. 63, 64, 65, incorporated into the Bankruptcy Acts, 1869, s. 25 (4) ; 1883, s. 56 (5).

(d) *Davis v. Tollemache*, 2 Jur. (n.s.) 1181.

1130. If a judgment debtor become tenant in possession, he may be ordered, in an action to realize the charge, to give full effect to it by executing a disentailing deed (e). Paragraphs 1130—1132

1131. Equity formerly gave no help to contracts for the transfer of ships, or any interests therein, where the contracts were not made in compliance with the statutes which regulated such transfers. But subject to the provisions of the Merchant Shipping Act, 1894, equities may now be enforced against owners and mortgagees of ships as in respect of any other personal estate (140). Judgment debtor may be ordered to bar entail. Equitable mortgages of ships.

1132. Questions as to the rights of persons under defective conveyances may be settled in suits between mortgagors and mortgagees, in which the mortgagee has a right to bring before the court all who claim interests in the estate (f). How questions as to defective assurances settled.

SECTION II.

Tacking of Securities as against Mesne Incumbrancers.

	PARAGRAPH
<i>The doctrine of tacking</i>	1133
<i>Has no application to Yorkshire lands</i>	1134

SUB-SECTION (1).—Possession of or dominion over Legal Estate essential.

<i>Legal estate essential to the right to tack</i>	1135
<i>At what date the legal estate must be acquired</i>	1136
<i>A partial or limited legal interest sufficient to support tacking</i>	1137
<i>But legal estate in part of a property does not give right to tack debts charged on other part</i>	1138
<i>Actual possession of legal estate not always necessary to tacking if party desiring to tack has best right to call for it</i>	1139
<i>Receipt on building society's mortgage vests legal estate in party who discharges it and who may tack further advance</i>	1140
<i>No right to tack if legal estate parted with</i>	1141
<i>Immaterial that the legal estate acquired by party tacking was originally granted as security for a debt since satisfied</i>	1142
<i>Mortgagee of legal estate for value without notice has priority even where his title derived by breach of trust or fraud</i>	1143
<i>But innocent mortgagee cannot gain priority by purchasing legal estate where the purchase is a breach of trust</i>	1144
<i>Purchaser for value without notice from purchaser with notice is protected and vice versa</i>	1145

SUB-SECTION (2).—The Debt to be Tacked must be a Specific Charge on the Property.

<i>Debts not forming specific lien on property cannot be tacked</i>	1146
<i>Legal mortgagee may tack subsequent advances and judgment or statute debts</i>	1147
<i>How far creditor may tack further advance as against surety</i>	1148
<i>Judgment or statute creditor cannot tack by acquiring legal estate</i>	1149
<i>Rules apply where a charge is intended, however inartificially it may be expressed</i>	1150
<i>The rule does not extend to a charge on the purchase money to be derived from a sale of the land</i>	1151

(e) *Lewis v. Duncombe*, 20 Beav. 398.

(f) *Evans v. Jones*, Kay, 29.

Paragraph
1133

SUB-SECTION (3).—*Both Securities must be held in the same Right.*

Trustees and executors cannot tack debts due to them personally or vice versa 1152

SUB-SECTION (4).—*The subsequent security must have been created and acquired by the party desiring to tack without notice of the Mesne Incumbrance.*

Notice is fatal to the right to tack 1153

A mortgagee with notice of a prior one cannot by getting in outstanding term gain priority over prior mortgagees of whom he had no notice .. 1154

Notice immaterial after security once created 1155

First mortgagee who has forgiven part of debt cannot revive it to gain priority for a subsequent advance made with notice of second mortgage 1156

First mortgagee when mortgage expressly made security for further advances cannot gain priority for them if made after notice of subsequent incumbrances 1157

Notice of void deed immaterial 1158

SUB-SECTION (5).—*As to the Time of acquiring the Debt proposed to be Tacked.*

How far the right to tack is affected by lis pendens 1159

The doctrine
of tacking.

1133. The influence of the legal estate not only gives priority to the security to which it is joined (*g*) ; but, by a doctrine adopted by courts of equity, both in England and Ireland (*h*), a prior *legal* mortgagee, by annexing to his original security another which he holds for a subsequent debt ; or an incumbrancer subsequent to the second, by getting in a *prior* legal security, may, under certain circumstances, postpone the rights of intermediate incumbrancers, of which he had no notice when he made the subsequent advance, until satisfaction of both the securities which have been thus united.

This doctrine, called *tacking*, is applicable both to real and personal estate. It seems to be altogether contrary to any principle of equity, the essence of which is equality ; and it is in fact only founded upon the preference which in this country is shown to legal titles. The principle (*i*) of it is, that where there is a legal title and equity in

(*g*) The Vendor and Purchaser Act, 1874 (c.78), s. 7, provided that no priority or protection should be given or allowed to any estate, right or interest in *land* by reason of such estate, right or interest being protected by or tacked to any legal or other estate or interest in such land ; although the person claiming such priority or protection should claim as a purchaser for valuable consideration and without notice. Provided that the section should not take away from any estate right, title or interest, any priority or protection which but for the section would have been given or allowed thereto as against any estate or interest existing before the commencement of the Act. The enactment which made this important alteration in the law was, however, repealed by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 129, as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of the latter Act.

(*h*) *Tenison v. Sweeny*, 1 Jo. & Lat. 710 ; subject, however, to the effect of the Irish Registry Act, 6 Anne c. 2 (1266).

(*i*) See *March v. Lee*, 1 Ch. Ca. 162 ; *Morret v. Paske*, 2 Atk. 52 ; *Wortley v. Birkhead*, 2 Ves. Sen. 571 ; *Belchier v. Renforth*, 5 Bro. P. C. 292 ; *Rooper v. Harrison*, 2 Kay & J. 86.

one man, he shall not be hurt by reason of a mere prior equity in another; and its effect is merely to change the order of priority, and not to alter the mode of discharging the securities by combining the debts, and paying the interest on both in the first instance, instead of the interest and principal of each in succession (*k*). Paragraphs 1133—1136

1134. By the Yorkshire Registries Acts (*l*), provision is made for the registration of all mortgages of lands in Yorkshire; and registration constitutes actual notice. The Acts also provide that registered mortgages shall have priority according to their respective dates of registration, and that no priority shall be gained by any application of the doctrine of tacking. Has no application to Yorkshire lands.

We will now proceed to consider the qualifications necessary for the creditor who proposes to tack, and the circumstances under which he may do so; the nature of the debts which are subject to this right, and against what persons it may be enforced.

SUB-SECTION (1).—*Possession of or Dominion over Legal Estate essential.*

1135. The right to tack, as well as the right of legal priority generally (to which the following remarks as to the possession of the legal estate are also applicable), depends in the first place upon the possession of, or dominion over, a prior legal interest, to which, when tacking is in question, the inferior security may be joined. Legal estate essential to the right to tack.

A creditor cannot tack, if there be a prior legal mortgage, or a legal estate (*m*), or it seems a term of years, altogether outstanding (*n*), or attendant upon the inheritance (*o*); in which latter case the term will in equity follow all the estates subsisting upon the inheritance.

1136. The possession of the legal estate may be effectual, whether it be obtained before, or at the time of the subsequent incumbrance which it is desired to tack (*p*); but possession of it even at the latter period is not necessary. It is of equal force in the hands of an incumbrancer who either takes it upon advancing his money, or (later) in pursuance of a contract made at the time of the advance, for a legal mortgage (*q*), and of one who, having at At what date the legal estate must be acquired.

(*k*) *Latouche v. Dunsany*, 1 Sch. & Lef. 137; *Montgomery v. Donohoe*, 5 Ir. Ch. R. 495.

(*l*) 47 & 48 Vict. c. 54; 48 Vict. c. 4; and 48 & 49 Vict. c. 26.

(*m*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 490.

(*n*) *Exp. Knott*, 11 Ves. 609, where the claim to tack was given up as against the *mesne* incumbrancer.

(*o*) *Charlton v. Low*, 3 P. Wms. 328; *i.e.*, supposing that it is not merged by the Satisfied Terms Act (8 & 9 Vict. c. 112). But a term which was already attendant might before that Act be clothed with a trust for a mortgagee or purchaser. (*Shaw v. Johnson*, 1 Dr. & Sm. 412. See Sugd. R. P. S. 282, note, ed. 2. And see *Plant v. Taylor*, 7 H. & N. 211; *Owen v. Owen*, 3 H. & C. 88.)

(*p*) *Huntington v. Grenville*, 1 Vern. 49.

(*q*) *Cooke v. Wilton*, 7 Jur. (N.S.) 281.

Paragraphs that time no notice of a prior incumbrance, afterwards gets in the
 1136—1139 legal estate as a protection for his own debt (*r*) (1174).

A partial or limited legal interest sufficient to support tacking.

1137. The possession of a partial interest in the legal estate, (such as a term of years), or a security which may be used at law, (as a judgment), is sufficient (*s*). But a mortgage of the inheritance (*t*), subject to a term, will be postponed to a security fortified by that term; and a later judgment will give no protection against the owner of an earlier one. So a term, created by a tenant for life, to secure an incumbrance on his life estate, will have priority over a later reversionary term limited by him out of the inheritance, though it be done by virtue of a power in the will under which he claims (*u*).

But legal estate in part of a property does not give right to tack debts charged on other part.

1138. But the acquisition of the legal estate in part of a security, will not protect any more of the subsequent incumbrance than is charged upon that part (*x*). So that if part of an estate be mortgaged to A., then the whole to B., and then the whole to C., the latter, by getting in A.'s mortgage, shall not protect more of his own debt than was charged on the land mortgaged to A.

On the other hand, if two estates be mortgaged to A., then to B., and then one of them to C.; C. redeeming A., shall hold both estates against B., till payment of both securities, and is not confined after payment on the purchased security to that part of the estate comprised in his original mortgage (*y*). But this belongs more properly to a different principle of priority (1210).

Actual possession of legal estate not always necessary to tacking if party desiring to tack has best right to call for it.

1139. Actual possession of the legal estate or interest is not however always necessary. An incumbrancer in whose favour a declaration of trust of the legal interest has been made (*z*), or who, having the best right to call for a transfer of that interest, has done some act short of obtaining a transfer, but equivalent to an act of ownership (*a*), will have all the benefit that he would have gained by an actual transfer. The custody of the deed creating the term, and a declaration (*b*) of trust in favour of the second incumbrancer, without notice of the prior mortgage, will give him an advantage over the first, who has no express declaration, or has only a covenant

(*r*) *Willoughby v. Willoughby*, 1 T. R. 763; *Barnett v. Weston*, 12 Ves. 130; *Sharpe v. Foy*, L. R. 4 Ch. 35.

(*s*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; see *Re Russell Road Purchase-Moneys*, L. R. 12 Eq. 78.

(*t*) *Exp. Knott*, 11 Ves. 609.

(*u*) *Hurst v. Hurst*, 16 Beav. 372.

(*x*) *March v. Lee*, 1 Ch. Ca. 162.

(*y*) *Bovey v. Skipwith*, 1 Ch. Ca. 201.

(*z*) *Willoughby v. Willoughby*, 1 T. R. 763; *Stanhope v. Earl Verney*, 2 Eden, 81; Co. Litt., But., n. 290 b; *Wilkes v. Bodington*, 2 Vern. 599; *Wilmot v. Pike*, 5 Hare, 14; *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231.

(*a*) *Earl of Pomfret v. Lord Windsor*, 2 Ves. Sen. 486; *Maundrell v. Maundrell*, 10 Ves. at p. 271; *Exp. Knott*, 11 Ves. at p. 618; Sugd. V. & P. 738, ed. 14; *Pease v. Jackson*, L. R. 3 Ch. 576: overruled on another point by *Hosking v. Smith*, 13 App. Cas. 582.

(*b*) *Stanhope v. Earl Verney*, *supra*.

to produce the deeds respecting the term ; and where no declaration exists, the taking possession of the deed alone, or making the trustee a party to the instrument, are acts which will be sufficient to give the benefit of the legal estate (c) (1209). Paragraphs
1139—1141

But an express declaration of ownership will not avail against a subsequent *bona fide* incumbrancer without notice who has obtained an actual assignment (d). Nor, it seems, will an incumbrancer, who, having the best right to call for, has not actually got in the legal interest, or done some equivalent act, and *has no express declaration of trust in his favour*, be allowed to derive any advantage from his bare right (e).

1140. By the Acts relating to building societies, a reconveyance of a legal mortgage made to such a society is unnecessary. A simple indorsed receipt for the money revests the legal estate in “the person or persons for the time being entitled to the equity of redemption.” It has been held that where a third person pays off a building society’s mortgage, such a receipt vests the legal estate in him and not in the mortgagor or a *puisne* equitable mortgagee, the third person being entitled to be placed in the shoes of the society (f). And having thus got the legal estate, it has been further held that he is entitled to tack a further advance made contemporaneously to the mortgagor without notice of the *puisne* incumbrance (f). Receipt on
building
society’s
mortgage
vests legal
estate in
party who
discharges it,
and who
may tack
further
advance.

1141. If the *puisne* incumbrancer having the legal estate, upon trust for the first mortgagee (and under circumstances which entitle him to hold it after discharge of the prior incumbrance, for the security of his own as against the *mesne* incumbrancer), parts with the legal interest by selling the estate in execution of his trust, for the purpose of discharging the prior mortgage ; the legal title being No right to
tack if legal
estate parted
with.

(c) *Maundrell v. Maundrell*, 10 Ves. at p. 271 ; *Pease v. Jackson*, L. R. 3 Ch. 576 ; *Fourth City, etc., Building Society v. Williams*, 14 Ch. D. 140.

(d) *Stanhope v. Earl Verney*, *supra*.

(e) *Maundrell v. Maundrell*, 10 Ves. at p. 271 ; *Exp. Knott*, 11 Ves. 609. The meaning of Lord ELDON in the latter case is misrepresented by the reporter in the marginal note, at p. 618, and not clearly stated in the text. Lord ELDON is assumed to have laid down that the prior incumbrancer, if he has a better right to call for the legal estate, is, in equity, in the same state as if he had it. But this does not agree with his next observation, that before deciding that question in bankruptcy, he must be satisfied there was no danger of error ; nor with his doctrine in *Maundrell v. Maundrell*, where he plainly says that the term *must be got in in some sense* ; and then goes on to say what will be sufficient. It is submitted that the observation in *Exp. Knott*, referred throughout to the question, what a court of equity was bound to hold, and should run thus :—“It must be considered with reference to the question, whether the first incumbrancer has a better right to call for an assignment of the legal estate, and *whether*, from that circumstance, a court of equity is bound to hold, not only that the first mortgage shall be protected as if it was the first equitable security, but that, having a better right to call for the assignment, he is in equity in the same state as if he had it.” By this reading, the sentence will be quite consistent with the rest of the judgment.

(f) *Hosking v. Smith*, 13 App. Cas. 582 ; overruling *Pease v. Jackson*, L. R. 3 Ch. 576 ; and *Robinson v. Trevor*, 12 Q. B. D. 423 ; and see *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866.

Paragraphs 1141—1143 no longer interposed, the court falls back upon the equitable principle of priority of date (1168), and deals accordingly with the surplus moneys in the hands of the *puisne* incumbrancer (g).

Immaterial that the legal estate acquired by party tacking was originally granted as security for a debt since satisfied.

1142. In cases which are unaffected by the Satisfied Terms Act (h), or by notice of a trust (i), it is not material, as regards the power of the legal estate to confer priority, that the debt, in respect of which the legal security was given, has already been satisfied, whether it were a mortgage of the fee (k), or for a term (l), or a judgment, or statute (m). It was even held that a legal advantage might be obtained by ill-practice or actual theft (n), but this certainly would not now be permitted (o). It was said in an old case (p), that the purchase of satisfied incumbrances might not be allowed where a person was designing a fraud; and where, by fraud, a prior incumbrance was procured to be vacated, the person aggrieved was put in the same plight as if it were in force (q).

Mortgagee of legal estate for value without notice has priority even where his title derived by breach of trust or fraud.

1143. Notwithstanding the rule that he who is best entitled to call for a transfer of the legal estate will take priority of other equitable incumbrancers, nevertheless a purchaser or mortgagee for valuable consideration is protected by a legal right, obtained without notice, though the conveyance was made by a trustee in fraud of his trust (r), or the assignment was otherwise fraudulent, or was obtained by fraud (s); provided the assignee had no notice

(g) *Rooper v. Harrison*, 2 Kay & J. 86.

(h) 8 & 9 Vict. c. 112.

(i) See *Carter v. Carter*, 3 K. & J. 617; and *Prosser v. Rice*, 28 Beav. 68, 74.

(k) *Hitchcock v. Sedgwick*, 2 Vern. 156; *Turner v. Richmond*, 2 Vern. 81; *Holt v. Mill*, 2 Vern. 279; but see and consider *Carter v. Carter*, *supra*, and *Prosser v. Rice*, *supra*.

(l) *Willoughby v. Willoughby*, 1 T. R. 773; *Maundrell v. Maundrell*, 10 Ves. at p. 270; *Evans v. Bicknell*, 6 Ves. 174, 185. Even against the Crown, if a term in gross were assigned before actual extent, it would not be liable; nor would a term, limited on a sale to the vendor to secure part of the purchase-money, be liable under an extent to the vendee, where before payment of the purchase-money he sold to a purchaser, who paid the debt, and had the term assigned to a trustee to attend the inheritance; for the term was never in the Crown debtor. (*Nicholls v. How*, 2 Vern. 389; *Fleetwood's case*, 8 Rep. 171 a; *King v. Lamb*, 13 Pr. 649). But a term attendant on the inheritance would be bound by the extent, even in the hands of a *bonâ fide* purchaser without notice. (*Nicholls v. How*, *supra*).

(m) *Edmunds v. Povey*, 1 Vern. 187; *Stanton v. Sadler*, 2 Vern. 30.

(n) *Sir John Fagg's case*, 1 Eq. Ca. Abr. 354; *Burnel v. Ellis*, cited 2 Vern. 158, and *Harcourt v. Knowel*, cited 2 Vern. 158.

(o) *Carter v. Carter*, 3 K. & J. 617.

(p) *Edmunds v. Povey*, *supra*.

(q) *Huntington v. Greenville*, 1 Vern. 49. "A man who comes in upon valuable consideration cannot strengthen his title by purchasing in the title of a stranger by fraud." (Gilb. Lex. Præ. 248.) "It sufficeth not in the law, ne yet in conscience as me seemeth, that a man hath right to that that he sueth for, but that also he sue by a just means, and that he hath both good right and also a good, and a true convenience to come to his right." (Doct. & Stud. 144.) So where a person whose property was pledged, and the money misappropriated by another, promised to pay a certain sum for redeeming it; and afterwards by a trick repossessed himself of the property; he was not allowed to hold it against the pledgee without payment. (*Mocatta v. Bell*, 24 Beav. 585.)

(r) *Pilcher v. Rawlins*, L. R. 7 Ch. 259.

(s) *Lloyd v. Attwood*, 3 De G. & J. 614.

of the fraud. And the same rule enables a mortgagee to tack a further advance, made without notice, to a person in possession of a mortgaged estate, and falsely claiming to be owner of the equity of redemption (*t*). Paragraphs
1143—1144

1144. But if the *puisne* mortgagee had notice, he will not be protected, though the notice were only constructive (*u*). And inasmuch as he who takes an assignment from a trustee with notice of the trust, becomes himself a trustee (*x*), a subsequent equitable incumbrancer without original notice, will not be allowed any benefit by getting in a legal estate from a mortgagor, whom (actually or constructively) *he knows to be a trustee*, holding the legal estate for the protection of a prior equitable mortgagee (*y*). But for a trust or equity to affect the conscience of a person who gets in the legal estate from a trustee, it must be a trust or equity in favour of the person against whom the legal estate is set up, and not in favour of third parties (*z*). Moreover, it would seem that it is only when the legal estate has been acquired from a trustee *in the proper sense of the term*, that the acquisition of it has been held of no avail (*a*). Thus where a first incumbrancer of two estates was induced by a third incumbrancer of one of them to release that one to the mortgagor on the express condition that the mortgagor should convey it forthwith to the third mortgagee, the latter was held to be entitled to tack as against the second mortgagee, for the first mortgagee was not a trustee for the second, and the release to the mortgagor and conveyance by him to the third mortgagee was a mere matter of form (*b*). So the holder of debentures upon the property of a corporation, under an Act of Parliament which placed all debenture holders on an equal footing, was not allowed to gain priority in respect of a debenture debt by means of a mortgage on other property of the corporation (*c*). But innocent mortgagee cannot gain priority by purchasing legal estate where the purchase is a breach of trust.

And in the converse case where the trustee knows that he is a trustee, but the equitable incumbrancer does not, the former can give no advantage against his *cestui que trust* by assigning a legal interest without receiving value (*d*).

(*t*) *Young v. Young*, L. R. 3 Eq. 801; but *quære* whether this did not depend on the now obsolete plea of purchaser, etc.

(*u*) *Maxfield v. Burton*, L. R. 17 Eq. 15.

(*x*) *Saunders v. Dehew*, 2 Vern. 272; *Mumford v. Stohwasser*, L. R. 18 Eq. 556; *Perham v. Kempster*, [1907] 1 Ch. 373.

(*y*) *Allen v. Knight*, 5 Hare, 272; *Perham v. Kempster*, [1907] 1 Ch. 373. See *Willoughby v. Willoughby*, 1 T. R. 763; and see *Blennerhassett v. Day*, 2 Ba. & Be. 104; *Sharples v. Adams*, 32 Beav. 213; but see observations of Sir G. JESSEL, M.R., in *Maxfield v. Burton*, *supra*; *Harpham v. Shacklock*, 19 Ch. D. 207.

(*z*) *Taylor v. Russell*, [1891] 1 Ch. 8.

(*a*) *Ib.*; *per* Lord MACNAGHTEN, [1892] A. C. at p. 261.

(*b*) *Taylor v. Russell*, *supra*; and see and consider *Bailey v. Barnes*, [1894] 1 Ch. 25.

(*c*) *De Winton v. Mayor, etc., of Brecon*, 26 Beav. 533.

(*d*) *Mumford v. Stohwasser*, L. R. 18 Eq. 556, *per* Sir G. JESSEL, M.R.; and *Maxfield v. Burton*, L. R. 17 Eq. 15, as explained by NORTH, J., in *Garnham v. Skipper*, 55 L. J. Ch. 263.

Paragraphs
1144—1146

Where the mortgagee acquired the legal estate by a conveyance, executed under a mistake as to the ownership of the property, it was held that he should have no benefit against trusts disclosed on the face of the instrument which constituted his title to the legal estate (*e*).

Purchaser for
value with-
out notice
from pur-
chaser with
notice is
protected,
and *vice versa*.

1145. A purchaser for value without notice who has the legal estate is protected, though he who conveyed it to him was affected by notice (**1176**). Therefore, if a third mortgagee advance his money upon a transfer of the first mortgage, without notice of the second, he shall have priority over the second, though the latter upon taking his security gave notice to the first (*f*). And *vice versa*, if an incumbrancer without notice assign to one who has notice, the assignee (provided he be a transferee of the very same interest which was held by the person under whom he claims (*g*)) may protect himself; and the reason given by Lord *Hardwick* is, that it is to prevent the stagnation of property (*h*). The rule holds, although the conveying party has notice of an actual trust, where he is an unsatisfied mortgagee, who lent his own money without notice of the trust. So that where one, who had covenanted to convey upon trust, made three successive mortgages without notice, the first mortgagee, who had priority by virtue of the legal estate, was able, by conveying to the third mortgagee, to give him preference before the trust (*i*).

SUB-SECTION (2).—*The Debt to be Tacked must be a Specific Charge on the Property.*

Debts not
forming
specific lien
on property
cannot be
tacked.

1146. It is essential to the right to tack, that the debt was either originally contracted on the credit of the estate, or, if at first it were a simple contract debt, or only a general lien upon the mortgaged property, that a specific security was taken for it without notice of the intermediate incumbrance (*k*).

(*e*) *Carter v. Carter*, 3 K. & J. 617; not approved of by James and *MELLISH*, L.JJ., in *Pilcher v. Rawlins*, L. R. 7 Ch. 259. See observations in *Prosser v. Rice*, (28 Beav. at p. 74) to the effect that the getting in of a legal interest from a bare trustee, gives no advantage.

(*f*) *Peacock v. Burt*, 4 L. J. (N.S.) Ch. 33. But this doctrine is not to be extended: per C. A. *West London Commercial Bank v. Reliance, etc., Building Society*, 29 Ch. D. 954.

(*g*) *Brandlyn v. Ord*, 1 Atk. 571. *The Celtic King*, [1894] P. 175; *Ledbrook v. Passman*, 57 L. J. Ch. 855.

(*h*) *Mertins v. Jolliffe*, Ambl. 313; *Sweet v. Southcote*, 2 Bro. C. C. 66; *Lowther v. Carlton*, 2 Atk. 139; *Ferrars v. Cherry*, 2 Vern. 383; *M'Queen v. Farquhar*, 11 Ves. 467. See *Harrison v. Forth*, Pre. Ch. 51; *Kettlewell v. Watson*, 21 Ch. D. 685.

(*i*) *Bates v. Johnson*, Johns. 304. See *Spencer v. Pearson*, 24 Beav. 266. But this right of a first mortgagee to transfer to a third in preference to a second was questioned in *West London Commercial Bank v. Reliance, etc., Building Society, supra*. In a suit for specific performance a title depending upon the vendor's want of notice under such circumstances will not be forced upon the purchaser. (*Freer v. Hesse*, 4 De G. M. & G. 495).

(*k*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Exp. Knott*, 11 Ves. 609; *Lacey v. Ingle*, 2 Ph. 413.

The whole doctrine of tacking being a great severity upon the intermediate incumbrancer (who may have lent his money on a sufficient security, and is yet liable to be defeated by a matter *inter alios acta*), this rule is strictly followed (l).

Paragraphs
1146—1149

1147. The consequences of it are, that a legal mortgagee may tack a further charge (m), or a *subsequent* judgment, or statute debt (n), to his mortgage against an intermediate incumbrancer; because in each case he may be supposed to have lent on the faith of the estate already mortgaged to him. And the same principle applies to the transferee of a legal mortgage who contemporaneously makes a further advance without notice of a subsequent incumbrance (o).

Legal mortgagee may tack subsequent advances and judgment or statute debts.

1148. He may also, perhaps, tack a further advance as against a surety if the contract of guarantee did not affect his right to make further advances (p), and may certainly do so where he has no notice that the surety was merely a surety (q). But where he had notice of an intermediate charge, then, as he cannot tack as against that charge, it has been held that he cannot in general tack as against the surety's right to the benefit of his security on payment of the first advance alone (r).

How far creditor may tack further advance as against surety.

1149. On the other hand, a creditor by statute or judgment cannot tack by *getting in* a legal security (s); for he did not trust to the credit of the land, nor could he like a subsequent mortgagee, be deceived by the mortgagor's concealment of a prior incumbrance (t).

Judgment or statute creditor cannot by acquiring legal estate tack them.

(l) *Brace v. Duchess of Marlborough*, *supra*.

(m) *Bedford v. Backhouse*, Kelynge, 5; *Lloyd v. Attwood*, 3 De G. & J. 614.

(n) *Shepherd v. Titley*, 2 Atk. 348; *Anon.*, 2 Ves. Sen. 662; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491.

(o) *Wyllie v. Pollen*, 3 De G. J. & S. 596; *Carlisle Banking Co. v. Thompson*, 28 Ch. D. 398; *Hosking v. Smith*, 13 App. Cas. 582.

(p) *Williams v. Owen*, 13 Sim. 597; *Farebrother v. Wodehouse*, 23 Beav. 18; dissented from by *HALL, V.-C.*, in *Forbes v. Jackson*, 19 Ch. D. 615; but followed by *BYRNE, J.*, in *Nicholas v. Ridley*, [1904] 1 Ch. 192. This case was, however, decided by the Court of Appeal on other grounds.

(q) *Re Toogood*, 61 L. T. 19; and see also *Duncan Fox and Co. v. North and South Wales Bank*, 6 App. Cas. 1, 12; *Nicholas v. Ridley*, *supra*.

(r) *Drew v. Lockett*, 32 Beav. 499; *Forbes v. Jackson*, *supra*; *Leicestershire Banking Co. v. Hawkins*, 16 T. L. R. 317.

(s) *Brace v. Duchess of Marlborough*, *supra*; *Breerton v. Jones*, 1 Eq. Ca. Abr. 325; *Exp. Knott*, 11 Ves. 609.

(t) In the previous editions the learned author advanced some reasons for the contention that since 1 & 2 Vict. c. 110, a judgment creditor may tack by force of the statutory change in the nature of his security. His argument was as follows:—

“The principal reason why the judgment creditor could not tack before the statute 1 & 2 Vict. c. 110, seems to be, that he had not lent his money on the credit of the property, and had no estate originally in the land. *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Anon.* 2 Ves. Sen. 662; *Exp. Knott*, 11 Ves. at p. 617. But that Act expressly gives (s. 13) the judgment creditor the same remedies in equity, against the hereditaments charged by virtue of the Act, as he would be entitled to in case the person against whom judgment is entered up had power to charge, and had by writing agreed to charge, the same hereditaments with the judgment debt and interest. A judgment creditor is therefore now a person having a charge on the estate, as if by contract, instead of, as heretofore, by force

Paragraphs
1150—1152

Rule applies where a charge is intended, however inartificially it may be expressed.

1150. The rule in question has been held to enable the holder of notes, expressed as receipts for a sum of money from the debtor, "to be secured by mortgage upon my S. estate," to protect his debt by the purchase of a prior legal mortgage (*u*). Where, however, there was a legal mortgage of leaseholds (*x*), the mortgagee was not allowed to tack to that security subsequent advances made on the strength of a parol engagement that they should be so tacked. This last case was not decided upon the rules of tacking in the view which we are now taking of them, but upon the question as to the right to make an equitable mortgage, by deposit, a security for subsequent advances. The argument was, that the mortgagee, having a legal assignment, held under a contract for conveyance, and not a contract for deposit, and the doctrine of equitable mortgages was not to be extended to such a case. The case of *Matthews v. Cartwright* (*u*) of course assumed, that the notes or receipts, if they did not amount to an equitable charge upon the estate, were at least evidence of an actual loan on the security of the land.

The rule does not extend to a charge on the purchase money to be derived from a sale of the land.

1151. The operation of this rule prevents a person who has lent the mortgagor money on the security of a contract for sale of the estate, that is, on the security of the purchase-money, from protecting his advance by getting in a prior legal mortgage (*y*).

SUB-SECTION (3).—*Both Securities must be held in same Right.*

Trustees and executors cannot tack debts due to them personally, and *vice versa*.

1152. The person who claims a right to tack must hold both securities in the same right.

Therefore, if a prior mortgagee take an assignment of a subsequent mortgage, as trustee for another (*z*), or become possessed as executor (*a*) of a *puisne* mortgage of leaseholds, he cannot tack to

of a proceeding *in invitum*; from the time of the return to the writ of execution (*Guest v. Cowbridge Rail. Co.*, L. R. 6 Eq. 619) he has a specific charge upon the estate, and the character of an equitable mortgagee. *Per* TURNER, L.J., *Exp. Boyle, Re Boyle*, 17 Jur. at p. 981. If, therefore, before the Act that equity only was wanting which would arise from having trusted to the credit of the estate, the Act seems to have supplied this defect. It is not material whether the judgment creditor at first lent his money on the judgment, or took it to secure an existing debt; for a simple contract bond or judgment creditor, who takes a mortgage to secure his original debt, being entitled to tack, as much as a mortgage creditor, from the beginning (*Exp. Knott*, 11 Ves. 609), it seems to follow, that if a judgment creditor may tack as above suggested, it will make no difference how the judgment was taken. But this principle would not, it seems, apply as well to the subsequent, as to the prior judgment creditor; for the former takes by his judgment only what the debtor has to give him, that is, he takes subject to prior equities" (1292).

The learned Author, however, appears to have overlooked the fact that by 27 & 28 Vict. c. 112, s. 2, judgment creditors were deprived of their lien on real estates until the land is actually delivered in execution by virtue of an elegit or other lawful authority. Anyhow, the present editor cannot believe that the doctrine of tacking would in these days be extended.

(*u*) *Matthews v. Cartwright*, 2 Atk. 347.

(*x*) *Exp. Hooper*, 1 Mer. 7.

(*y*) *Lacey v. Ingle*, 2 Ph. 413.

(*z*) *Morret v. Paske*, 2 Atk. 52; and see *Shaw v. Neale*, 6 H. L. C. 581.

(*a*) *Barnett v. Weston*, 12 Ves. 130; and see *Lewes v. Morgan*, 5 Price, at p. 155.

the prejudice of *mesne* incumbrancers; for though the estates be in one person, he holds them in different rights, and as if they were in different persons. But he may tack under a deed which secures a debt of his own, though it also contains trusts for others (*b*). So a trustee who has a charge on the share of one of his beneficiaries, can tack it to his legal estate, so as to squeeze out a prior incumbrance of whose incumbrance he had no notice (*c*).

Paragraphs
1152—1153

There are earlier cases, in which creditors, holding one of the securities as personal representatives, have been allowed to tack. As where a woman executrix (*d*), and sole legatee of the mortgagee, married, and then lent money to the mortgagor on bond. And where a woman being a bond creditor, married the mortgagee and died, and he took out administration to her, he was allowed to tack (*e*). But it will be observed in both cases, that it was only the legal title which was gained by representation, the executrix and administrator being otherwise beneficially entitled to the property; whereas it is conceived that the rule under consideration applies only when the person claiming to tack has nothing more than a legal title by representation, or as a trustee to one of the debts.

SUB-SECTION (4).—*The subsequent Security must have been created and acquired by the Party desiring to Tack without Notice of the Mesne Incumbrance.*

1153. The prior mortgagee, when he acquires the subsequent security (*f*), and the *puisne* incumbrancer, when he originally lends his money (*g*), must be without notice of the incumbrance, which, by virtue of the legal estate, he claims to postpone.

Notice is
fatal to the
right to tack.

Therefore, if a third mortgagee have advanced money (*h*), with notice of the second, and have afterwards bought in the first, he cannot hold as against the second after the first has been paid (**831**). For notice makes him come fraudulently, so that he has no longer equal equity (which must coincide with possession of the legal estate) with the other incumbrancer. And besides, as has been observed (*i*), the act of lending with notice, amounts to an acknowledgment, that the lender will take subject to him of whose claim he has notice.

(*b*) *Spencer v. Pearson*, 24 Beav. 266.

(*c*) *Phipps v. Lovegrove*, L. R. 16 Eq. 80, 88; *Newman v. Newman*, 28 Ch. D. 674.

(*d*) *Price v. Fastnedge*, Ambl. 685.

(*e*) *Blackwell v. Symes*, cited Amb. 686. Note, that the tacking in these cases was against the heir of the mortgagor, and therefore not in conflict with Rule VII. (954).

(*f*) *Morret v. Paske*, 2 Atk. 52; *Willoughby v. Willoughby*, 1 T. R. 763; *Bedford v. Backhouse*, 2 Eq. Ca. Abr. 615; *Shepherd v. Titley*, 2 Atk. 348.

(*g*) *Willoughby v. Willoughby*, *supra*; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491.

(*h*) *Hiles v. Moore*, 15 Beav. 175.

(*i*) *Pow. Mort.* 453, n. (*x*).

Paragraphs
1154—1157

A mortgagee with notice of a prior one, cannot by getting in outstanding term gain priority over prior mortgagees of whom he had no notice.

Notice immaterial after security once created

First mortgagee who has forgiven part of debt cannot revive it to give priority for a subsequent advance made with notice of second mortgage.

First mortgagee, where mortgage expressly made security for further advances cannot gain priority for them if made after notice of subsequent incumbrances.

1154. And a mortgagee, who has lent with notice of a prior incumbrance, shall not, by getting in an old outstanding term, be satisfied against others of which he had not notice; because he had not the best right to call for the legal estate (*k*). If he conceal his notice, as by taking a covenant that the estate is free from incumbrances, except the term, this being against conscience, will be a further reason against preferring him.

1155. So far as this rule applies to the *puisne* incumbrancer, it will be observed to imply, that notice of the *mesne* charge at the time of tacking the prior one, is no objection; that being, to use the words of Lord *Hardwick* (*l*), the very occasion that shows the necessity of taking it in. And he may even get it in after action brought by the *mesne* incumbrancer (*m*).

1156. It is a general rule, that if the first mortgagee lend a further sum without notice of a second mortgage, his whole money shall be paid in the first place (*n*). But a mortgagee who has forgiven part of the debt, and has afterwards lent a further sum of like amount, at the time of lending which he had notice of an intermediate mortgage, cannot tack his further advance as a revival of the debt which was forgiven (*o*); and parol evidence is not admissible in such a case of the intention to revive the old debt.

1157. It was formerly held (*p*) that where the original mortgage was expressly made a security for further advances, and a second mortgagee lent his money with notice of this provision, the first mortgagee might tack his further advances made subsequently to the second mortgage, though he had notice of that security; because it was folly of the second mortgagee, with notice, to take such a security. The decision appears to have been incorrectly reported; and after being doubted by Mr. *Coventry* and Lord *St. Leonards* (*q*), was overruled for the reasons urged in the present work (*r*), with some others: viz., that the doctrine amounted to a perpetual curb on the mortgagor's right to incumber the equity of redemption; and that it is contrary to the general principles of equity that a mortgagee should, by thus taking a security for advances which may never be made, put a pressure on the mortgagor, by taking away his power of raising money from other persons; the first mortgagee being never bound by such a clause to make further advances

(*k*) *Willoughby v. Willoughby*, *supra*; and see the case before Lord *Cowper* (*Anon.*), cited 10 *Ves.* 270.

(*l*) *Wortley v. Birkhead*, 2 *Ves. Sen.* 571; *Edmunds v. Povey*, 1 *Vent.* 187; *Blackwood v. London Chartered Bank of Australia*, L. R. 5 P. C. at p. 111.

(*m*) *Rooper v. Harrison*, 2 *Kay & J.* 86.

(*n*) *Bedford v. Backhouse*, 2 *Eq. Ca. Abr.* 615; *Calisher v. Forbes*, L. R. 7 *Ch.* 109.

(*o*) *Shepherd v. Titley*, 2 *Atk.* 348.

(*p*) *Gordon v. Graham*, 7 *Vin. Abr.* 52, pl. 3, E. 3.

(*q*) *Pow. Mort.* 534, note (*e*); *Blunden v. Desart*, 2 *Dru. & War.* 405.

(*r*) 1st ed. p. 363.

at the mortgagor's pleasure. And it is now held that, after notice, of a *mesne* incumbrance, or sale of the mortgaged property, the first mortgagee cannot as against the later incumbrancer or the purchaser tack to his debt further advances made to the mortgagor (s). And the rule, that in such a case the further advances of the first will be postponed to the debt of the second incumbrancer, will not be affected by an alleged trade custom operating for the benefit of the first incumbrancer only (t); nor because the mortgage imposes an obligation on the mortgagee to make such further advances (u); but *secus* where the mortgagee is liable to a third party, *e.g.* where he is a guarantor, and the mortgage covers payments made under the guarantee (v). Notice to one of several joint mortgagees is for this purpose notice to all (x). The same principle prevents a joint stock company claiming a lien on the shares of a member (under an express provision in the articles of association) for debts incurred after they have received notice of an incumbrance on the shares (y). The principle also applies to mortgages of ships (z).

1158. The doctrine of notice does not generally affect a *puisne* incumbrancer, whose security avoids the earlier deed; as where before 1893 the subsequent incumbrancer took with notice of a prior voluntary settlement (a). Paragraphs 1157—1159
Notice of void deed immaterial.

SUB-SECTION (5).—*As to the Time of acquiring the Debt proposed to be Tacked.*

1159. A prior mortgagee cannot tack a subsequent debt taken over *pendente lite* (b), if (it is presumed) the suit be registered; but a *puisne* incumbrancer may tack a prior security so taken over, provided it be taken over before a decree has been made to account (c); for after that he can do nothing to change the order of payment (d). How far the right to tack is affected by a *lis pendens*.

(s) *Hopkinson v. Rolt*, 9 H. L. C. 514, affirming the decision of M.R. in *Rolt v. Hopkinson*, 25 Beav. 461; *London and County Banking Co. v. Ratcliffe*, 6 App. Cas. 722; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29; *Re Keogh's Estate*, [1895] 1 Ir. R. 201; *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A. C. 281. *Freeman v. Laing*, [1899] 2 Ch. 355, and see also *Hughes v. Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607, where the principle of *Hopkinson v. Rolt* was applied to the consolidation of mortgages. As to the application of the principle to the case of a continuing guarantee, see *Burgess v. Eve*, L. R. 13 Eq. 450, and as to the case of a current account at a bank see *Deeley v. Lloyd's Bank*, [1910] 1 Ch. 648, and *supra* (1514).

(t) *Dawn v. City of London Brewery Co.*, L. R. 8 Eq. 155; *Menzies v. Lightfoot*, L. R. 11 Eq. 459. (u) *West v. Williams*, [1899] 1 Ch. 132.

(v) *Gannon v. Gannon*, [1909] 1 Ir. Reps. 57.

(x) *Freeman v. Laing*, [1899] 2 Ch. 355.

(y) *Bradford Banking Co. v. Briggs*, *supra*; *Bank of Africa v. Salisbury Gold Mining Co.*, *supra*. (z) *The Benwell Tower*, 72 L. T. 664.

(a) *Gardiner v. Painter*, Sel. Ca. in Ch. 65.

(b) *Morret v. Paske*, 2 Atk. 52.

(c) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Hawkins v. Taylor*, 2 Vern. 29; *Robinson v. Davison*, 1 Bro. C. C. 63; *Peacock v. Burt*, 4 L. J. (N.S.) Ch. 33; *Belchier v. Butler*, 1 Eden, 522; *Bates v. Johnson*, 5 Jur. (N.S.) 842.

(d) *Bristol v. Hungerford*, 2 Vern. 525; *Wortley v. Birkhead*, 2 Ves. Sen. 571; *Exp. Knott*, 11 Ves. 609.

Paragraphs
1159—1160

This restriction on the prior mortgagee depends upon the rule last considered : because the suit, if registered, is notice to him of the *mesne* incumbrance. As to the *puisne* incumbrancer, whose right to get in the earlier security has been held (e) not to be prejudiced by the prior submission of the first mortgagee, by his answer in the suit, to assign his security to the plaintiff on payment of his debt, the rule as to notice is different ; and the reason why he may tack *pendente lite*, up to the time of decree, is that, up to that time the change of the priorities will not vary any right which might not have been varied before the commencement of the suit ; and that a subsequent incumbrancer may have no knowledge of, and, consequently, may be unable to protect himself against the *mesne* charge until the suit is already pending ; and as the honesty of his debt is not affected by the discovery, so his right of protecting it, and the efficacy of the protection, are not prejudiced.

But the inquiry into the priorities deals with them as they stand at the date of the judgment (f), at which, and not at any subsequent time, they are considered as fixed. If it were not so, an incumbrancer who had obtained a judgment for redemption, might be shut out by a prior incumbrancer, who, after judgment, had conveyed to another subsequent to them both. But a bankruptcy has not the effect of a judgment so as to prevent subsequent changes of priority (g).

SECTION III.

Tacking as against the Mortgagor himself and Persons claiming through him other than Mesne Incumbrancers.

	PARAGRAPH
<i>Tacking applies not merely as between incumbrancers but as between an incumbrancer and the debtor and his successors in title</i>	1160
<i>Tacking allowed against mortgagor whenever it would be allowed against mesne incumbrancer</i>	1161
<i>An execution creditor may tack</i>	1162
<i>No tacking allowed against mortgagor or assigns for value where debt not a lien on estate</i>	1163
<i>Tacking of ordinary debts allowed against heir and beneficial devisee of debtor</i>	1164
<i>But not allowed to prejudice of mesne incumbrancers or even ordinary creditors of deceased debtor</i>	1165
<i>Simple contract debts may now be tacked as against heir or beneficial devisee</i>	1166
<i>Concise view of the doctrine of tacking</i>	1167

Tacking
applies not
merely as
between in-

1160. In addition to tacking as against mesne incumbrancers the expression is also extended to the right which a mortgagee sometimes possesses of declining to allow of redemption without payment

(e) *Belchier v. Butler*, 1 Eden, 522. (f) *Wortley v. Birkhead*, 2 Ves. Sen. 571.

(g) *Exp. Knott*, 11 Ves. 609.

not only of the mortgage debts, but also of other debts which may be owing to him from the mortgagor. Although this right scarcely comes under the present head of "priority among incumbrancers," it seems convenient to consider it at this place as the principles on which it is founded are substantially the same as those which govern "tacking" as against *mesne* incumbrancers.

1161. From what has been said in the last preceding section it follows, *a fortiori*, that whenever a mortgagee can tack as against *mesne* incumbrancers he can also tack as against the mortgagor himself and all persons claiming under him. In other words, whenever the debt to be tacked is one which forms a lien on the mortgaged property, it may be tacked as against the mortgagor (*h*).

1162. Thus a judgment duly registered after execution has been issued and a return made by the sheriff, may be tacked notwithstanding the bankruptcy of the judgment debtor, provided the execution was completed by seizure and sale before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor (*i*).

1163. But debts, which are not a lien upon the mortgaged property, may not be tacked either against the mortgagor himself, or any person claiming under him, except those who have become liable in respect of their possession of the mortgaged property to the payment of such debts; and even against them it cannot be done to the prejudice of *mesne* incumbrancers.

Therefore neither against the mortgagor (*k*) himself, his creditors (*l*), assignees for valuable consideration (*m*), or his devisees in trust for payment of debts (*n*), or persons entitled to the benefit of a charge (*o*) for payment of his debts, or the assignee (*p*) of his heir,

(*h*) *Lacey v. Ingle*, 2 Ph. 413.

(*i*) *Baker v. Harris*, 16 Ves. 397; *Exp. Boyle, Re Boyle*, 17 Jur. 979; *Bankruptcy Act*, 1883, s. 45.

(*k*) *Challis v. Casborn*, Pre. Ch. 407; *Archer v. Snatt*, 2 Str. 1107; *Elvy v. Norwood*, 5 De G. & Sm. 240. *Demainbray v. Metcalfe*, 2 Vern. 691, seems *contra*, and even goes to the extent that a derivative pawnee of chattels personal may hold the pledge as against the original pledgor until payment, not only of the amount due to the derivative pawnee, but also of moneys lent by him to the original pawnee on notes of hand. But the decision is queried by the reporter, and seems to be of no authority.

(*l*) *Heams v. Bance*, 3 Atk. 630; *Adams v. Claxton*, 6 Ves. 226; *Coleman v. Winch*, 1 P. Wms. 775; *Hamerton v. Rogers*, 1 Ves. Jun. 513.

(*m*) *Troughton v. Troughton*, 1 Ves. Sen. 86; *Anon.* 2 Ves. Sen. 662; *Adams v. Claxton*, *supra*.

(*n*) *Heams v. Bance*, 3 Atk. 690; *Irby v. Irby*, 22 Beav. 217.

(*o*) *Price v. Fastnedge*, Amb. 685.

(*p*) *Coleman v. Winch*, *supra*; *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Bayly v. Robson*, 2 Eq. Ca. Abr. 594.

Paragraphs
1160—1163

incumbrances, but as between an incumbrancer and the debtor, and his sequels in title.

Tacking allowed as against mortgagor whenever it would be allowed against *mesne* incumbrancer.

An execution creditor may tack.

No tacking allowed against mortgagor, or assigns for value where debt not a lien or estate.

Paragraphs executor, or beneficial devisee (none of whom are liable by possession
 1163—1165 of the estate to the payment of the mortgagor's simple contract debts, or bond or other specialty debts, not being a lien on the estate), will there be (*q*) any right to tack such debts. This rule prevents a surety from tacking against the *puisne* mortgagee the costs of defending an action by the mortgagee whose debt the surety has discharged, such costs being only a simple contract debt (*r*).

Tacking of ordinary debts allowed against heir, and beneficial devisee of debtor.

1164. Against the heir (*s*) and beneficial devisee (*t*), however, who are liable in respect of their possession of the mortgaged real estate, descending upon or devised to them, to discharge the bond and other specialty debts of the mortgagor, such debts may be tacked; and the personal representative of the mortgagor, being in like manner liable in respect of his possession of the mortgagor's chattels to his bond and other specialty (*u*) and simple contract (*x*) debts, such debts may be tacked against him, to securities on the testator's chattels. And this is confessedly (*y*) not founded upon any principle of equity, but is merely to avoid circuitry of action, that the creditor may not be driven to enforce, by separate proceedings, claims to which the operation of law or the act of the mortgagor have rendered the same person liable.

But not allowed to prejudice of *mesne* incumbrancers, or even ordinary creditors of deceased debtor.

1165. But the tacking of debts on the principle of avoiding circuitry, whether the incumbrancer claim by mortgage, judgment, or statute (*z*), is not permitted to be done to the injury of persons against whom the creditor has no equity, such as *mesne* incumbrancers, or specialty or general creditors of the insolvent estate of a deceased mortgagor (*a*).

(*q*) Notwithstanding *Baxton v. Manning*, 1 Vern. 244; *Halliley v. Kirtland*, 2 Rep. in Ch. 162; and other early cases, in which bond debts were allowed to be tacked against the mortgagor.

(*r*) *South v. Bloxam*, 11 Jur. (N.S.) 319.

(*s*) *Margrave v. Le Hooke*, 2 Vern. 207; *Morret v. Paske*, 2 Atk. 53; Anon. 2 Ves. Sen. 662; *Jones v. Smith*, 2 Ves. Jun. 372; *Elvy v. Norwood*, 16 Jur. 493.

(*t*) *Heams v. Bance*, 3 Atk. 630; *Coleman v. Winch*, 1 P. Wms. 775; see *Du Vigier v. Lee*, 2 Hare, 326.

(*u*) Anon., 2 Vern. 177.

(*x*) *Coleman v. Winch*, 1 P. Wms. 775; *Eccles v. Thawill*, Pre. Ch. 18; *Rolfe v. Chester*, 20 Beav. 610; see *Spalding v. Thompson*, 26 Beav. 637; *Re Haselfoot's Estate*, L. R. 13 Eq. 327.

(*y*) *Lowthian v. Hasel*, 3 Bro. C. C. 162; *Jones v. Smith*, 2 Ves. Jun. 372; *Heams v. Bance*, 3 Atk. 630; *Morret v. Paske*, 2 Atk. 52.

(*z*) *Morret v. Paske*, 2 Atk. 52; *Powis v. Corbett*, 3 Atk. 556; *Lowthian v. Hasel*, 3 Bro. C. C. 162; *Rolfe v. Chester*, 20 Beav. 610.

(*a*) *Talbot v. Frere*, 9 Ch. D. 568; JESSEL, M.R., dissenting as to mortgagee's right to retain surplus purchase-moneys as against creditors, from *Spalding v. Thompson*, 26 Beav. 637; *Re Haselfoot's Estate*, L. R. 13 Eq. 327; *Re General Provident Assurance Co., Exp. National Bank*, L. R. 14 Eq. 507. But conf. *Gannon*

1166. Where real estate was the subject of the mortgage, the simple contract debts of the mortgagor could not formerly be tacked against the heir or beneficial devisee of the mortgagor. But real estate having been made, by 3 & 4 Will. 4, c. 104, assets in the hands of the heir or devisee of the debtor, for the payment as well of simple contract as of specialty debts, the mortgagee may now tack subsequent simple contract debts against those persons by reason of their liability in respect of their possession of the estate to pay such debts; but not against specialty creditors (*b*), prior to the passing of 32 & 33 Vict. c. 46, by which in the administration of the estates of deceased persons specialty and simple contract creditors are treated as standing in equal degree; and it is considered that the Act has not enlarged the right of tacking (*c*).

Paragraphs
1166—1167

Simple
contract
debts may
now be
tacked as
against heir
or beneficial
devisee.

1167. The following is a concise view of the practical effect of the rules which we have been considering—

Concise
view of the
doctrine of
tacking.

- (1.) A prior mortgagee being without notice of a *mesne* legal incumbrance, and having acquired at any time before a duly registered *lis pendens* affecting the securities, a subsequent charge on the estate; or
- (2.) A *prior* mortgagee or person who has lent his money on the credit of the property, and who, by purchase or otherwise, has obtained a prior legal interest at any time before a decree to account, in a suit affecting the priorities of incumbrancers on the estate, and without having had notice of prior incumbrances at the time of lending on his original security; and
- (3.) Whether the legal interest were originally or subsequently acquired holding both securities in the same right may tack—

Debts by mortgage, further charge or judgment (all these being a lien on the estate),	}	against	{	The mortgagor, and all who claim under him, including <i>mesne</i> incumbrancers.
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Bond and other specialty debts of the mortgagor, in the case of a mortgage of realty, whether freehold or copyhold, and also by virtue of 3 & 4 Will. 4 c. 104, his simple contract debts,	}	against	{	The heir and beneficial devisee of the mortgagor, where there are no <i>mesne</i> incumbrancers.
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v. Gannon, [1909] 1 Ir. R. 57 (C.A.), where it was held that a mortgagee (under a mortgage extending to further advances) who was also the mortgagor's executor, and a guarantor for him was entitled after the mortgagor's death to tack to his mortgage the amount which he had been called on to pay under the guarantee.

(*b*) *Rolfe v. Chester*, 20 Beav. 610; *Thomas v. Thomas*, 22 Beav. 341.

(*c*) As to the mode of construing the Act, see *Re Williams' Estate*, L. R. 15 Eq. 270.

Paragraph
1167

Bond and other specialty- and
simple contract debts of the mortgagor
in a mortgage of personalty,

against { The personal representative of the
mortgagor, where there are no *mesne*
incumbrancers.

But they may not tack—

The simple contract bond or other
specialty debts of the mortgagor
being no lien on the estate,

against { The mortgagor, his creditors,
assignees for valuable consideration,
devises in trust or persons entitled to
a charge for payment of his debts, or
the assignee of his heir, executor or
beneficial devisee.

CANADIAN NOTES

TACKING

NEITHER specialty nor simple contract debts can be tacked as against the mortgagor himself. The law is now settled that for subsequent advances the mortgagee has no equity to charge the land mortgaged merely because he held a mortgage for moneys advanced (*a*).

But debts paid off by the mortgagee to protect his title can be tacked as against the mortgagor or the heir or devisee redeeming (*b*).

A mortgagee is not entitled to tack to his mortgage debt the costs of unsuccessful proceedings taken without the concurrence of the mortgagor (*c*).

A mortgagor's devisee is not entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor (*d*).

A mortgagor conveyed his equity of redemption to a third party and afterwards contracted to release to the mortgagee, and the latter, without notice of the prior conveyance, paid the mortgagor some part of the consideration that he had contracted to give for the release. Held, that he was entitled to tack what he had paid to his mortgage debt (*e*).

The right of tacking obtains only when the mortgages or charges sought to be tacked are created by, or arise against the same person. A first mortgagee cannot as against the first

(*a*) *Ferguson v. Frontenac* (1874), 21 Gr. 188; *Canadian Bank of Commerce v. Forbes* (1885), 10 P. R. 442.

(*b*) *Trust and Loan Co. v. Cuthbert* (1868), 14 Gr. 410; *Watkins v. McKillar* (1859), 7 Gr. 584; *Teeter v. St. John* (1863), 10 Gr. 85; *Wells v. Trust and Loan Co.* (1884), 9 O. R. 170; 20 C. L. J. 407.

(*c*) *Wells v. Trust and Loan Co.* (1884), 9 O. R. 170; 20 C. L. J. 407.

(*d*) *McLaren v. Fraser* (1870), 17 Gr. 533.

(*e*) *Gordon v. Lothian* (1851), 2 Gr. 293.

mortgagor who seeks to redeem tack to the first mortgage a second mortgage on the same property, made after the mortgagor has parted with the equity of redemption (*f*).

An equitable mortgage or incumbrance cannot be tacked to another equitable mortgage so as to acquire priority over an intervening incumbrance unless it be by virtue of prior registration (*g*).

The mesne incumbrance may be protected by registration of his mortgage under the Registry Act (*h*), as registration is notice to all persons claiming any interest in the lands subsequent thereto, s. 92.

Tacking is not allowed to prevail against the provisions of the Registry Act (*i*).

(*f*) *Stark v. Reid* (1895), 26 O. R. 257.

(*g*) R. S. O. (1897), c. 136, ss. 87, 92, 97.

(*h*) R. S. O. (1897), c. 136.

(*i*) R. S. O. (1897), c. 136, s. 98.

CHAPTER IV.

Of Priority apart from the Possession of the Legal Estate.

	PARAGRAPH	Paragraph
Section I.—The General Rules relating to Priority between mere Equitable Incumbrances	1168—1183	1168
„ II.—The effect upon Priority between Equitable In- cumbrancers of Fraud or Negligence ..	1184—1199	
„ III.—The effect upon Priority between Equitable In- cumbrancers of Possession of the Title Deeds	1200—1209	
„ IV.—The Priority in Equity given by the right to Consolidate Securities	1210—1225	

SECTION I.

The General Rules relating to Priority between merely Equitable Incumbrancers.

<i>Equitable mortgagee without notice entitled to add further advances, but with that exception equitable mortgages rank in order of date ..</i>	1168
<i>Salvage advances have priority</i>	1169
<i>Solicitor's lien has priority</i>	1170
<i>Salvage no application in case of officious payment, but aliter in respect of payments made by interested party</i>	1171
<i>Party paying off a prior incumbrance entitled to have it kept on foot for his benefit although no transfer of it made to him</i>	1172
<i>Salvage principle does not place mortgagee who pays rent in position of the landlord on mortgagor's bankruptcy</i>	1173
<i>How far equitable mortgagee can gain priority by getting legal estate ..</i>	1174
<i>Solicitor with notice of equitable mortgage cannot acquire lien on deeds ..</i>	1175
<i>A mere equitable incumbrancer without notice is not protected like a legal incumbrancer</i>	1176
<i>The equitable mortgagee of a trustee's beneficial interest is liable to lose his security to make good trustee's breaches of trust</i>	1177
<i>No priority by estoppel in cases of equitable mortgage</i>	1178
<i>Equitable mortgagee cannot by arrangement with first legal mortgagee get priority over mesne incumbrancer</i>	1179
<i>The proceeds of mortgaged property are equally affected with the property itself</i>	1180
<i>An equitable mortgage affects all the mortgagee's interest not previously pledged</i>	1181
<i>Conflicting authorities where B. has priority over A., and C. over B. but not over A.</i>	1182
<i>Priority of unpaid vendors</i>	1183

1168. The equitable, like the legal mortgagee, is entitled, as Equitable
against the mortgagor and all claiming under him, who have not mortgagee
without

Paragraphs (or for any reason are not allowed to retain) the full benefit of the
1168—1169 legal estate, to add to his original debt, subsequent advances or
 notice liabilities made or incurred upon the security or credit of the estate,
 entitled to without notice of any *mesne* charge (a) (1156). But with that
 add further exception, when there are several incumbrancers whose equities
 advances, but are not disturbed by notice or otherwise, their rights generally take
 with that effect in order of date, according to the maxim, *Qui prior est tempore*
 exception equitable *potior est jure* (b). And where several instruments have been
 mortgages rank in order executed on the same day priority will follow the order of execution,
 of date. subject to any intentions appearing on the deeds themselves; and
 the times of their respective execution if uncertain will be ascertained
 by inquiry (c).

Salvage
 advances
 have priority.

1169 A notable exception to this general rule is, however, made
 in favour of advances, by means of which the whole of the incum-
 bered property is saved from loss or destruction; and which, upon
 a plain principle of equity, are payable in priority to all other charges
 of earlier date, and among themselves have precedence according
 to the inverse order of their respective dates. The most familiar
 application of this principle is in cases of bottomry, for the validity
 of which kind of security it is necessary that the advance should
 be made for the preservation or salvage of the ship, or the prosecution
 of the voyage (235, 1259).

The salvage principle is applied, in other cases, to secure the
 repayment of money advanced for the preservation of incumbered
 property from ruin or forfeiture.

In a late case (d), in which a claim was made by a second mort-
 gagee, for the repayment of money expended in the construction
 of a wall to prevent the irruption of the sea (which, however, appeared
 to have failed in its object), it was laid down that a second mortgagee
 who enters into possession, and does work by way of improvement
 on the mortgaged land which may result in its protection, and the
 improvement of its value, is not entitled, as against the first mort-
 gagee, to any charge in respect of the money expended upon such
 work. The distinction, no doubt, must be borne in mind, between
 expenditure which is, and that which is not necessary when it is
 made, to preserve the property from destruction. As to the former,
 there can be no doubt of the justice and expediency of the rule, that
 he who advances money to save property from destruction, for the

(a) *Wormald v. Maitland*, 35 L. J. Ch. 69 (questioned as to the effect of constructive notice, *Agra Bank v. Barry*, L. R. 7 H. L. 135); *Calisher v. Forbes*, L. R. 7 Ch. 109. See *St. John v. Holford*, 1 Ch. Ca. 97, relating to the liabilities of a surety.

(b) *Bristol v. Hungerford*, 2 Vern. 525; *Beckett v. Cordley*, 1 Bro. C. C. 353; *Rice v. Rice*, 2 Drew. 73; *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231, at p. 260.

(c) *Gartside v. Silkstone and Dodsworth Coal Co.*, 21 Ch. D. 762.

(d) *Landowners, etc., Drainage and Inclosure Co. v. Ashford*, 16 Ch. D. 411.

benefit of all who are interested in it, shall be repaid his outlay before all other claims (e). It is applied both in the civil and maritime law, and so long ago as the year 1710 was recognized by the Court of Chancery, in a case (f) in which the master of a ship taken by an enemy had ransomed her, and had become a hostage for the money. It was ordered that the ransom money must be raised out of the profits, notwithstanding any former mortgage of the ship; "for," said Lord Chancellor *Cowper*, "if there was a precedent mortgage, what would become of that security if the ship had not been redeemed?" And in a modern case (g) Lord *St. Leonards* said, "There are cases in which the court has properly given a salvage creditor priority over all other incumbrances" (1198).

Paragraphs
1169—1172

1170. Upon this principle, it has been held that a solicitor who brings a cause to a conclusion is entitled to priority for his costs over one who had previously conducted, but for want of means or for other reasons has abandoned it: and it seems also over the costs of a former solicitor who has been discharged (h). The principle is also adopted in cases of payment of head rent, in order to prevent eviction by a superior landlord: and in this form it is of common occurrence in Ireland.

Solicitor's
lien has
priority.

1171. This equity will not operate in favour of a stranger, by whom a voluntary and officious payment is made (i) (520—524). But any creditor, sub-tenant, or other person interested in the preservation of the security (j), or, it would seem that any one who lends at the instance of an interested person, will be entitled to the benefit of it (k); and if the lender be in receipt of the rents of the estate, he must apply them in redemption of this charge in priority to his own security (l).

Salvage no
application
in case of
officious
payments,
but *aliter* in
respect of
payments
made by
interested
party.

1172. So where one lends money at the request of the owner or the tenant for life and trustees of an estate, or of either of them, for the purpose of paying off an incumbrance, he will be entitled to have the incumbrance kept alive for his benefit, even although he took no transfer of it (m) (795, 1534). For if the parties requesting him had themselves paid it off, they would have been

Party paying
off a prior
incumbrance
entitled to
have it kept
on foot for
his benefit,
although no
transfer of it
made to him.

(e) See *Cleary v. McAndrew*, *Cargo ex Galam*, 2 Moo. P. C. (N.S.) at p. 235, per Lord KINGSDOWN. A somewhat similar rule prevails where successive tenants for life pay instalments of a capital charge burdening the inheritance. In that case their charges by way of subrogation rank *pari passu* and not in order of date, *Re Nepean's Settled Estate*, [1900] 1 Ir. R. 298.

(f) *Hope v. Winter*, 2 Eq. Ca. Abr. 690.

(g) *Angell v. Bryan*, 2 Jo. & Lat. 763. See also *Shearman v. British Empire Mutual Life Assurance Co.*, L. R. 14 Eq. 4.

(h) *Cormack v. Beisly*, 3 De G. & J. 157, *folld.* in *Re Wadsworth*, *Rhodes v. Sugden*, 34 Ch. D. 155.

(i) *Fetherstone v. Mitchell*, 11 Ir. Eq. R. 35.

(j) *Id.*; *Locke v. Evans*, 11 Ir. Eq. R. 52; *Hill v. Browne*, 6 Ir. Eq. R. 403.

(k) *More v. More*, 60 L. T. 626; *Butler v. Rice*, *infra*.

(l) *Sloane v. Mahon*, 1 Dru. & Wal. 189.

(m) See *Butler v. Rice*, [1910] W. N. 143.

Paragraphs
1172—1176 entitled to keep the charge alive, and the person who advances the money is entitled to stand in their place by subrogation (*n*). Nor is this right waived by the party paying, taking an express charge on part of the property (*o*). If successive tenants for life pay off several instalments of an incumbrance on the fee simple they rank *pari passu inter se* and not in order of time (*p*).

Salvage principal does not place mortgagee who pays rent in position of the landlord on mortgagor's bankruptcy.

How far equitable mortgagee can gain priority by getting legal estate.

1173. The principle is not applied in bankruptcy, in favour of a mortgagee who pays rent which is due, or for which the landlord has distrained, so as to enable the mortgagee to stand in the landlord's place, and be preferred to other creditors, unless he have first applied to the court that he may have such priority in consideration of his paying the rent in arrear (*q*).

1174. As above stated, one of several equitable incumbrancers may gain priority over the others by getting in a legal title from persons who commit no breach of trust in parting with it to him in aid of his equity, if he had no notice when he lent his money (1121). But an equitable mortgagee, though originally without notice, can gain no priority by getting in a legal interest as against *cestuis que trust* of the mortgagor, after notice of their rights, for he takes subject to such rights, and becomes a trustee himself (*r*): as a person who takes a legal mortgage, with notice actual or constructive of an infirmity in the title, is subject to the equities existing against the title; and if the latter be set aside, the mortgage falls with it (*s*).

Solicitor with notice of equitable mortgage cannot acquire lien on deeds.

1175. The claim of the equitable mortgagee, against the mortgagor, will in like manner prevail (*t*) against the solicitor of the latter, into whose hands the deeds come after the equitable right has arisen; and will prevent the solicitor from acquiring as against him any lien on the deeds for his costs after that period. Nor will the lien, under such circumstances, arise where the costs have been partly incurred for the benefit of the equitable mortgagee, unless the solicitor were actually employed by him; the solicitor's lien being a right arising out of the relation between employer and employed (*u*) (631).

A mere equitable

1176. The rule under which an incumbrancer without notice, having the legal estate, is protected, though he claim through

(*n*) *Patten v. Bond*, 60 L. T. 583; and see also *Redman v. Rymer*, 60 L. T. 385; *Butler v. Rice*, *supra*.

(*o*) *Chetwynd v. Allen*, [1899] 1 Ch. 353; *Butler v. Rice*, *supra*.

(*p*) *Re Nepean's Settled Estate*, [1900] 1 Ir. R. 298.

(*q*) *Anon.*, 1 Atk. 102; *Exp. Cocks*, 3 Deac. & C. 8.

(*r*) *Saunders v. Dehew*, 2 Vern. 272; *Allen v. Knight*, 5 Hare, 272; *Mumford v. Stohwasser*, L. R. 18 Eq. 556. As to the right to priority if he acquire the legal interest without notice of the rights of the *cestuis que trust*, see (940).

(*s*) *Cookson v. Lee*, 23 L. J. Ch. 473.

(*t*) *Molesworth v. Robins*, 2 Jo. & Lat. 358; *Pelly v. Wathen*, 1 De G. M. & G. 16; *Smith v. Chichester*, 2 Dru. & War. 393; *Blunden v. Desart*, 2 Dru. & War. 405.

(*u*) *Pelly v. Wathen*, *supra*.

one who had notice (1145), is inapplicable to the case of a mere equitable incumbrancer; an equitable incumbrancer being unable, by concealing his notice from a person, who claims under him, to make his security more extensive, or give to his assignee a better right than that which he himself possesses. Therefore, where there were three successive mortgages to A., B. and C., and C. had notice of B.'s mortgage, and registered before him, and then assigned to D., who had no notice of B.'s mortgage, D. was held not to have priority over B. (x).

Paragraphs
1176—1177
incumbrancer
without
notice is not
protected
like a legal
incum-
brancer.

This rule applies to an equitable mortgage by a trustee of the property of his beneficiary. The mortgagee, claiming under a breach of trust, cannot set up his right against that of the beneficiary, unless the latter has been guilty of negligence or misrepresentation. The mere omission to make inquiry as to the manner in which the trustee has disposed of the property will not postpone the *cestui que trust*; and it makes no difference if the mortgaged property belongs partly to the trustee himself (y). Where the trustee was a confidential clerk it was held that although the trust was "a simple trust," the fact that he had access, in the course of his duties, to the deeds, was not negligence sufficient to postpone the *cestuis que trust* to an equitable mortgagee of the clerk (z).

In fact where there is an infirmity in the title of a mortgagor, or an incapacity to contract, he can convey no equitable interest to his mortgagee (a); and on the ground that a right cannot generally be established in a mortgagee which did not exist in the person under whom he claims; a creditor who advanced money to clear off rent in arrear, in order to prevent ejectment against the devisee of a leasehold for lives, and took a mortgage to secure them, was not allowed priority over judgment creditors of the devisor (b).

1177. On the same principle, the mortgagee of the beneficial interest of a trustee in settled property is in no better position than the trustee himself, and if the latter makes default to the trust estate, his mortgagee will be postponed to the claims of the beneficiaries; and this applies not only to shares taken by the trustee directly under the trust instrument, but also to derivative interests (c).

The equitable mortgagee of a trustee's beneficial interest, is liable to lose his security to make good trustee's breaches of trust.

(x) *Ford v. White*, 16 Beav. 120; *Tothill*, 284; *Duke's Char. Us.* 639.

(y) *Cory v. Eyre*, 1 De G. J. & S. 149; *Baillie v. M'Kewan*, 35 Beav. 177; *Shropshire Union Railways and Canal Co. v. The Queen*, L. R. 7 H. L. 496; *Bradley v. Riches*, 9 Ch. D. 189.

(z) *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263. See *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231.

(a) *Robinson v. Briggs*, 1 Sm. & Giff. 188; *Collinson v. Lister*, 20 Beav. 356; on appeal 7 De G. M. & G. 634; *Parker v. Clarke*, 30 Beav. 54; *Inman v. Inman*, L. R. 15 Eq. 260. See *Judd v. Green*, 45 L. J. Ch. 108.

(b) *Angell v. Bryon*, 2 Jo. & Lat. 763; and see *Pinkett v. Wright*, 2 Hare, 120; affirmed (*sub nom. Murray v. Pinkett*) 12 Cl. & F. 764; *Clack v. Holland*, 18 Jur. 1007.

(c) *Doering v. Doering*, 42 Ch. D. 203.

Paragraphs
1178—1180

No priority
by estoppel
in cases of
equitable
mortgage.

Equitable
mortgagee
cannot by
arrangement
with first
legal mort-
gagee, get
priority over
mesne in-
cumbrancer.

The proceeds
of mortgaged
property are
equally
affected with
the property
itself.

1178. And a security made by a person who falsely represents, either by himself or his agent, that he has an interest in the property, will not bind an interest which he afterwards acquires, so as to give the mortgagee under the original security precedence over a later incumbrancer for valuable consideration, and without notice, and who took his security after the interest was acquired by the mortgagor (*d*).

1179. A *puisne* mortgagee cannot (except in cases where he can tack) get any priority over an earlier equitable incumbrancer, of whose security he has notice, by the aid of the first mortgagee, the latter upon payment being only a trustee for the mortgagor, and unable to charge the estate. Thus where after successive mortgages to A. and B., a third mortgage was made to C., in which A. joined, and covenanted that after payment of his debt the estate should stand charged with C.'s mortgage; it was nevertheless held, that C. should follow in his regular order after B. (*e*). Nor will any act of the first incumbrancer with the legal estate, amounting to an exercise of his right unfair or injurious to succeeding incumbrancers, be allowed to prejudice the rights of the latter. Thus (*f*) if the first mortgagee permit the mortgagor to receive the profits without requiring interest, that interest shall not affect the land as against the second mortgagee, so as to keep him out longer than if it had been duly paid. And if the first mortgagee sell the estate, the produce shall go in discharge of his debt, whether it be received by him or by the mortgagor.

1180. The proceeds of the sale of an estate are bound by all the same equities and claims which bound the estate itself. Therefore (*g*), if the mortgagor of an estate, having a life interest in the mortgage money, assign it, and afterwards the estate be sold under proceedings against him in bankruptcy, but the proceeds are insufficient to discharge the mortgage, the mortgagee has a right, as against the assignee of the life interest in the debt, to retain the income of the produce of the sale until the mortgage be satisfied; for before the sale he had a right to retain the estate until payment of the whole debt. So, if the mortgagee, having notice of a subsequent mortgage, join with the mortgagor in selling to a stranger, the money received by either for the purchaser shall sink so much of the prior debt for the benefit of the *puisne* mortgagee (*h*). And, moreover, the first mortgagee will be liable to the second if he allows the balance of the purchase money to be paid to the mortgagor (*i*).

(*d*) *Keate v. Phillips*, 18 Ch. D. 560. (*e*) *Brotherton v. Hatt*, 2 Vern. 574.

(*f*) *Bentham v. Haincourt*, 1 Eq. Ca. Abr. 320.

(*g*) *Smith v. Smith*, 1 Y. & C. Ex. 338; see *Lane v. Horlock*, 1 Drew. at p. 616.

(*h*) *Bentham v. Haincourt*, *supra*.

(*i*) *West London Permanent Commercial Bank v. Reliance Building Society*, 29 Ch. D. 954; *Ayling v. Mercer* (1885), W. N. 166.

And if a *puisne* incumbrancer purchase the estate, not mere contracting for the equity of redemption, but for the estate free from incumbrances, he must apply the purchase-money according to the priorities in time of the several incumbrancers, and has no right to satisfy his own debt first, and then to come as a specialty creditor against the mortgagor in respect of the deficiency of the purchase-money to discharge the prior incumbrances (*k*).

The right of trustees to be indemnified out of the trust estate in respect of the liabilities incurred in the exercise of their office is to be preferred to any charge created by the *cestui que trust* (*l*).

1181. In giving to equitable incumbrancers, with equal equities (*m*), priority according to time, the court also considers, that as between the mortgagor and the mortgagee, the mortgage affects the entire interest of the former, saving only the rights of prior incumbrancers. A mortgagor, after making an equitable mortgage, retains no equitable interest prior to that mortgage, and can therefore convey none to a subsequent mortgagee. And upon this principle, where (*n*) A. mortgaged to B. the equity of redemption of real estate, reciting in the mortgage that a certain deed was deposited with C. as security for a debt charged on the same estate, but which was false, and A. did afterwards deposit the deed with C. as security for moneys partly due before B.'s mortgage, it was held that C. had no priority over B. If, at the date of B.'s mortgage, there had been, as were recited, a security to C., which A. had afterwards paid off, or which had been otherwise avoided, B. would have had the benefit of the payment or avoidance. The whole of A.'s interest was in fact pledged to B., and he had nothing left in priority to that interest which he could transfer to C.

An equitable mortgage affects all the mortgagor's interest not previously pledged.

On the same principle, an equitable mortgagee by deposit of deeds will be postponed to a prior purchaser, whose purchase (without negligence on his part) has not been completed (*o*).

1182. It sometimes happens that an incumbrancer has priority over one of earlier date than himself, but not over another who is postponed to that incumbrancer; as where between securities dated in the order A. B. C., B. has priority over A. and C. over B.; but as between A. and C., A. has priority. Here if the fund available

Conflicting priorities where B. has priority over A., and C. over B.; but not over A.

(*k*) *Greenwood v. Taylor*, 14 Sim. 505: *S. C. sub nom. Att.-Gen. v. Cox*, 3 H. L. C. 240.

(*l*) *Re Exhall Coal Co.*, 35 Beav. 449; disapproved but followed in *Re Lancashire Cotton Spinning Co.*, *Re Carnelley*, 35 Ch. D. 656. And as to the paramount nature of the rights of consignees of West India estates, see *per* TURNER, L.J., *Daniel v. Trotman*, 1 Moo. P. C. (N.S.) 123.

(*m*) But the equities must be equal. See *Re Ffrench*, 21 L. R. Ir. 283; *Bank of Ireland v. Cogry Spinning Co.*, [1900] 1 Ir. R. 219; *Re Bobbett's Estate*, [1904] 1 Ir. R. 461.

(*n*) *Frazer v. Jones*, 5 Hare, 481; on appeal, 17 L. J. Ch. 353; see *Hughes v. Williams*, 3 Mac. & G. 683.

(*o*) *Flinn v. Pountain*, 58 L. J. Ch. 389.

Paragraphs be not more than B.'s security will exhaust, it will be paid first to
 1182—1184 C., to the extent of the debt for which he has priority over B., and the balance to B. But it seems that if the fund be more than enough for B. all further sums received by C. will be for the benefit of A. (*p*). In a case in Ireland, where, by force of registration, a deed gained priority over one of earlier date, it was held that the former could not shake off intermediate judgments of earlier date than itself, but carried them up, as was said, "upon its back" (*q*).

Priority of
unpaid
vendors.

1183. The question of priority between the unpaid vendor of real estate, in respect of his lien, and persons who claim under the purchaser, depends, like other questions of equitable priority, upon the circumstances of the case and the conduct of the parties, there being no especial equity attached to persons filling either of those characters (*r*); and as well between such persons as other equitable incumbrancers, an innocent incumbrancer, though later in time, will prevail over one who has less claim to equitable consideration.

SECTION II.

The Effect upon Priority between merely Equitable Incumbrancers of fraud or negligence.

	PARAGRAPH
<i>Payment according to time applies in case of mortgagor's fraud</i>	1184
<i>Rights of cestui que trust prevail over trustees' mortgagees</i>	1185
<i>Exceptions</i>	1186
<i>Equitable lien lost as against subsequent equitable incumbrances if owner of lien gives a receipt</i>	1187
<i>Frauds by solicitors of intended mortgagees</i>	1188
<i>Equitable mortgagee who by negligence enables fraud to be committed is postponed</i>	1189
<i>Notice to first mortgagee not necessary in case of second mortgagee of land in order to preserve priority</i>	1190
<i>Fraudulent act of agent only binds where relation of principal and agent exists</i>	1191
<i>Postponement by estoppel</i>	1192
<i>Amount of negligence required to postpone</i>	1193
<i>Negligence on both sides</i>	1194
<i>Creditors of bankrupt who allow him to trade are postponed to new creditors</i>	1195
<i>Vendor allowing one of several purchasing trustees to retain price loses lien</i>	1196
<i>Officers of public companies who omit to register their mortgages are not postponed</i>	1197
<i>Equitable incumbrancer is not postponed by refusing to make salvage advances</i>	1198
<i>Coverture and infancy does not excuse fraud</i>	1199

Payment
according to
time applies
in case of
mortgagor's
fraud.

1184. The rule of payment according to order of time also applies where the securities have been effected by fraud; provided that among the incumbrancers themselves, the equities are equal: so that where the mortgagor made two securities by depositing part

(*p*) *Benham v. Keane*, 1 Johns. & H. 685; *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507; *Re Lord Kensington*, Bacon v. Ford, 29 Ch. D. 527; *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188, 208; *conf. Re Armstrong*, [1895] 1 Ir. R. 87.

(*q*) *Sparrow v. Cooper*, 1 Jones, 72.

(*r*) *Rice v. Rice*, 2 Drew. 73; and see *Garrard v. Frankel*, 30 Beav. 445.

of the deeds with one person and part with another, the first had the preference (s). Paragraphs
1184—1186

1185. The equities of *cestuis que trust*, whose trustees have misapplied the trust estate, are of the same nature as those of mortgagees who have dealt with the trustees, and, being earlier in time, will prevail over them. Therefore, if an executor renews his testator's lease in his own name, and deposits it with a mortgagee, the mortgagee will be postponed to the persons interested in the estate (t). And if money have been paid to a person, to be applied by him in the purchase of property to be conveyed to trustees, or for investment on a particular mortgage, and he takes a conveyance of the property to himself, or misapplies the money, but invests an equivalent sum of his own on the security, and deals with the purchased property, or the security, as his own, the prior trust will, in either case, prevail against the equitable mortgagees of the trustee, though they paid their money without notice of the trust (u). And so, if a trustee in part beneficially interested in the mortgage debt, make an equitable mortgage or an equitable transfer as security for an advance to himself, the trust will prevail; and the possession of the deeds, thus acquired by a breach of trust, will not assist the subsequent mortgagee (x). These principles, however, of course have no application to the case of negotiable instruments, the legal interest in which passes by indorsement or delivery free from all equities, unless the transferee has notice (y).

1186. But if trustees invest the trust fund upon property which, by the terms of the purchase, becomes subject to an obligation, the *cestuis que trust* are bound by the obligation, though the transaction was a breach of trust, so long as they claim the benefit of the purchase (z). For *qui sensit commodum debet sentire et onus*. Exceptions.

In another case (a), in which A., being entitled to a legacy charged on real estates, joined with the owner of the estates in assigning the

(s) *Roberts v. Croft*, 24 Beav. 223; *Dixon v. Muckleston*, L. R. 8 Ch. 155.

(t) *Cave v. Cave*, 15 Ch. D. 639; *Re Morgan*, *Pillgrem v. Pillgrem*, 18 Ch. D. 93; *Re Evans*, *Evans v. Evans*, 34 Ch. D. 597; *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263; *Re Richards*, *Humber v. Richards*, 45 Ch. D. 589; *Isaac v. Worsten-croft*, 67 L. T. 351. The principle has been questioned in the Irish Courts, see *Re Ffrench*, 21 L. R. Ir. 283; *Bank of Ireland v. Cogry Spinning Co.*, [1900] 1 Ir. R. 219, and *Re Bobbett's Estate*, [1904] 1 Ir. R. 461; but it is conceived that these cases would not be followed in England.

(u) *Manningford v. Toleman*, 1 Coll. C. C. 670; *Harpham v. Shacklock*, 19 Ch. D. 207; expl. *Taylor v. Russell*, [1891] 1 Ch. 8; [1892] A. C. 244. But conf. *Re French*, 21 L. R. Ir. 283; and *Re Sloane*, [1895] 1 Ir. Reps. 146.

(x) *Stackhouse v. Countess of Jersey*, 1 Johns. & H. 721; *Cory v. Eyre*, 1 De G. J. & S. 149; and see *Welchman v. Coventry Union Bank*, 8 W. R. 729, where it was held that there was notice of the trust; and see *Newton v. Newton*, L. R. 6 Eq. 135, and judgment of Lord HATHERLEY, S. C. L. R. 4 Ch. at p. 143; *Thorpe v. Holdsworth*, L. R. 7 Eq. 139.

(y) *Baker v. Nottingham, etc., Banking Co.*, 60 L. J. Q. B. 542, and see *London Joint Stock Bank v. Simmons*, [1892] A. C. 201; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120.

(z) *New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302.

(a) *Greenwood v. Churchill*, 6 Beav. 314.

Paragraphs
1186—1187 fund to trustees, who were to hold it as a charge upon the estates, and afterwards released the fund without the concurrence of the trustees, and then (having with another become trustee in fee of the estates themselves) mortgaged them, first in fee, and again to a judgment creditor, who, in consideration of the mortgage, acknowledged satisfaction on her judgment: it was held, that the latter had priority over the trustees of the fund. The right to the fund was to be made out, it was said, through A. He had released it, and with his co-trustee had contracted to give the judgment creditor the benefit of a charge, instead of her judgment, upon which she entered up satisfaction on the faith of the contract and of the estate supposed to be vested in A. and his co-trustee. And though the release executed by A. was fraudulent as against his trustees, yet while it remained in force A. could not for them set up a title prior to a *bona fide* claimant on the equity of redemption of the estate, which was set free by that very release. It would be first necessary to establish an equity to set aside the release.

It is conceived that in this case the trustees might have preserved their priority, by putting notice of their settlement upon the title deeds. It is true, that as they were probably in the hands of the first mortgagee, the second mortgagee might even then have failed to get notice of it; but unless the case were affected by some such neglect or want of equity, the decision seems hardly consistent with the principles commonly applied. It is difficult to see in the fact that A. had released the fund, a reason for giving priority to the subsequent mortgagee. It no doubt induced her to give up her judgment, but the trustees were not therefore the less innocent, were equally defrauded, and were earlier in time.

Equitable
lien lost as
against
subsequent
equitable
incumbrancer
if owner of
lien gives a
receipt.

1187. If a vendor or mortgagee allows the purchase or mortgage money or part of it to remain unpaid, but nevertheless executes and delivers the conveyance with a receipt indorsed, either for the avowed purpose of enabling a security to be made to another incumbrancer, or under circumstances which enable another, *bona fide* and without notice, to acquire a security, the holder of the latter security, though it be but equitable, will have priority, whether the mortgage be made for money then advanced or for a debt already due (*b*): and even, it has been held, where the conveyance was executed on the promise of one only of several joint mortgagees, who thereby obtained a security, that the vendor should first be paid out of the purchase-money (*c*). But a conveyance or release so obtained cannot be used in favour of one who has not complied with the agreement on the faith of which it was made, or of any other person having no better equity than he (*d*).

(*b*) *Rice v. Rice*, 2 Drew. 73; *Hunter v. Walters*, L. R. 11 Eq. 292.

(*c*) *Smith v. Evans*, 28 Beav. 59.

(*d*) *Hatchell v. Cremorne*, LL. & G. t. Plunkett, 236.

And where a person entitled to an estate subject to charges was enabled to make an equitable security, by producing receipts for the charges, which the owners of the charges had signed upon a *bona fide* agreement for a mortgage security, they, having been guilty of no fraud and being prior in time, were preferred to a subsequent equitable mortgagee (*e*). *A fortiori* is this the case where the receipt has been forged. For where a person has notice of the creation of an equity he is bound to see that it is properly discharged, and this is so even where he acquires the legal estate. The protection afforded by the latter in fact only extends to persons without notice of the *creation* of prior equities, and not to persons who having had such notice act on the reasonable but erroneous belief that they have been discharged (*f*).

1188. If the solicitor of an intended transferee of a mortgage, being himself one of the transferors, prepare and execute a transfer, and receive the money, but all the transferors do not execute the deed or sign the receipt, the money is in the solicitor's hands as his client's money, and not as mortgagee; and if he misapply it his client will be the loser, though he have received interest from the mortgagor as if the transfer had been completed (*g*).

Where a mortgagee by transfer (from his own solicitor, who was the original mortgagee in possession) handed the deeds to the solicitor, who also acted for the mortgagor, that an abstract might be made for an intended purchaser, but did not give him the deed of transfer to himself, whereby the solicitor was enabled to sell the estate under the original mortgage, without notice of the transfer, and to receive and misapply the purchase-money: it was held (*h*) that the transferee should not be postponed if it could be shown that he had not authorized and had no notice of the payment of the purchase-money to the solicitor, to ascertain which, an issue was directed. And his keeping back the deed of transfer was treated as a natural precaution on the part of the transferee, and not as the result of any fraudulent motive.

1189. On the other hand, an equitable mortgagee, who by his own gross negligence, or by omitting to employ a proper agent fails to discover or enables another to commit a fraud will be as much affected as if he were the actual contriver though he himself be morally innocent of it; and as above stated (**1122**), the same rule appears to be applicable to legal mortgagees, although the cases seem to be somewhat conflicting. Thus, where the first mortgagee was induced by his solicitor to assign to another without consideration a prior mortgage, which had been executed

Paragraphs
1187—1189

Frauds by
solicitors of
intended
mortgagees.

Mortgagee,
who by
negligence
enables fraud
to be com-
mitted, is
postponed.

(*e*) *Beckett v. Cordley*, 1 Bro. C. 353. (*f*) *Jared v. Clements*, [1903] 1 Ch. 428.
(*g*) *Giffin v. Clowes*, 20 Beav. 61. (*h*) *Stevens v. Stevens*, 2 Coll. C. C. 20.

Paragraphs but not acted on (*i*), the deed in this case being valid on the face of
 1189—1191 it, and no proceedings having been taken to set it aside, was held good.

And so where a person executed a legal mortgage to his solicitor under the erroneous impression that it was merely an authority to raise money, his equitable claims were postponed to those of an equitable mortgagee, with whom the solicitor pledged the deeds (*k*). A similar decision was given where a first equitable mortgagee of shares, omitted to register a transfer of them for a year or so (*l*). And where a mortgagee of book debts obtained an order appointing a receiver, and restraining the mortgagor from getting them in, but took no further steps (by giving notice to the debtors) to perfect his security, he was postponed to a subsequent equitable incumbrancer who had shown more diligence (*m*).

And, if anything peculiar in the deed would have put a disinterested professional man on inquiry, a mortgagee cannot set up the defence that he had no professional adviser, or that out of the ordinary course he employed one who was interested in concealing the fraud (*n*).

Notice to first mortgagee not necessary in case of second mortgages of land in order to procure priority.

1190. As will be seen, *infra* (1226) in the case of personal estate, and particularly in that of choses in action (including a mortgage of the proceeds of the sale of land directed to be sold (1232)), an equitable mortgagee must give notice of his charge to the person who has the legal estate or possession, in order to preserve his priority over subsequent incumbrancers. This rule does not, however, apply to the case of equitable mortgages of *land*, and the mere omission of a second mortgagee to give notice of his charge to the first legal mortgagee, will not of itself be negligence sufficient to postpone him to a third or subsequent incumbrancer without notice (*o*) (1231). And the same exception applies to a submortgage of land, although, *qua* the original debt, it is a mortgage of a chose in action (*p*).

Fraudulent act of agent only binds where relation of principal and agent exists.

1191. In order to affect a mortgagee with the consequences of the fraudulent act of his agent, it must be shown that at the period at which the act was done, the relation of solicitor and client subsisted; it not being sufficient that it subsisted at a former period. Hence, a mortgagee will not be postponed to a subsequent purchaser, by reason that the solicitor whom he employed about the mortgage, and who also acted in the transaction for the mortgagor, assisted the latter in making the sale without notice of the mortgage; and

(*i*) *Hiorns v. Holtom*, 16 Beav. 259; *Roddy v. Williams*, 3 Jo. & Lat. 1. See *Hunter v. Walters*, L. R. 11 Eq. 292. (*k*) *French v. Hope*, 56 L. J. Ch. 363.

(*l*) *Kelly v. Munster Bank*, 29 L. R. Ir. 19; and see also *Marshall v. National Provincial Bank*, 61 L. J. Ch. 465; and *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1. (*m*) *Wigram v. Buckley*, [1894] 3 Ch. 483.

(*n*) *Kennedy v. Green*, 3 Myl. & K. 699; *Marjoribanks v. Hovenden*, Dru. 11; *Berwick & Co. v. Price*, [1905] 1 Ch. 632.

(*o*) See *Union Bank of London v. Kent*, 39 Ch. D. 238; and *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231.

(*p*) *Hopkins v. Hemsuworth*, [1898] 2 Ch. 347; and see also *Re Richards, Humber v. Richards*, 45 Ch. D. 589.

the relation of solicitor and client is not preserved by payment of interest on the mortgage through the hands of the solicitor. In making such payments the solicitor generally acts as the agent of the mortgagor (*q*) (1510). Paragraphs
1191—1192

It will be no argument in favour of a second mortgagee, seeking in such cases as these to displace the priority of the first, that the former mortgage was an improper investment of trust money, and consequently a breach of trust (*r*). Fact that mortgage was breach of trust does not affect its priority.

1192. There are also many cases which illustrate the rule recognized both at law and in equity, that where one by his words or conduct *wilfully* causes another to believe and act upon a certain state of things, so as to alter his own position, the former cannot aver against him the existence of a different state of things (*s*). Hence, where it can be shown that through the fraud or gross neglect of a prior incumbrancer, or his agent (*t*), another person has been induced to lend money on the same estate, the prior incumbrancer will be postponed; for instance, where the prior incumbrancer when informed that another security was in contemplation (*u*), denied or was silent as to his own charge on the estate; or where the prior mortgagee advised (*v*) the other, as his counsel, to complete the loan, and himself prepared the deed with a covenant that the estate was free from incumbrances; or where the prior mortgagee engrossed (*x*) the second mortgage. And it was even held, that the same result followed where he only witnessed it (*y*); but the principle of this decision was afterwards overruled (*z*), because a witness in practice is not privy to the contents of a deed. And the same was held, where an incumbrancer, being present during a treaty for settlement of the estate on a marriage, fraudulently concealed his mortgage from the person to be benefited, and agreed with the settlor to accept his personal security (*a*). And so where a person entitled to charges upon an estate of which she was also the devisee in trust, joined in a mortgage as devisee in trust and executrix, with the owner of the estate, without referring Postponement by estoppel.

(*q*) *Finch v. Shaw, Colyer v. Finch*, 18 Jur. 935, affirmed (*sub nom. Colyer v. Finch*), 5 H. L. C. 905. (*r*) *Allen v. Knight*, 5 Hare, 272.

(*s*) *Per* Lord DENMAN in *Pickard v. Sears*, 6 Ad. & El. 469. See *Hooper v. Gumm*, L. R. 2 Ch. 282; and *Powell v. Browne*, 24 T. L. R. 71.

(*t*) *Brown v. Thorpe*, 11 L. J. Ch. 73.

(*u*) *Cannock v. Jauncey*, 27 L. J. Ch. 57; *Commissioners of Public Works v. Harby*, 23 Beav. 508; *Ibbottson v. Rhodes*, 2 Vern. 554. An issue was directed on appeal to try whether this information was given. (*Upton v. Vanner*, 8 Jur. (n.s.) 405.)

(*v*) *Draper v. Borlace*, 2 Vern. 370; and see *Brown v. Thorpe*, *supra*; and *Kettlewell v. Watson*, 21 Ch. D. 685.

(*x*) *Clare v. Earl of Bedford*, cited 1 Bro. C. C. 357.

(*y*) *Mocatta v. Murgatroyd*, 1 P. Wms. 392. On the principle "that it would be presumed that every witness that could write or read was acquainted with the substance of the deed or instrument which he, having attested it, undertook to support with his evidence."

(*z*) *Mocatta v. Murgatroyd*, *supra*; *Watts v. Cresswell*, 9 Vin. Abr. 415, pl. 24; *Barret v. Wells*, Pre. Ch. 131. (*a*) *Berrisford v. Milward*, 2 Atk. 49.

Paragraphs 1192—1195 to her own charges (b). But a mortgagee need not go out of his way to give notice of his security upon hearing that the mortgagor is dealing with the estate (c).

The same equity was applied (d) against the representatives of a mortgagor, to make good his assertion to a purchaser of the estate, that part of the mortgage debt had, by agreement with the mortgagee, been transferred to other property, in exoneration of that agreed to be sold. The mortgagee having repudiated the alleged agreement, and having obtained payment of the whole debt from the purchaser, the latter was allowed to come upon the property alleged to have been substituted, for the difference. But where the loan has been made on the faith of a false representation *by a stranger*, the stranger cannot be compelled to make good the loss, where no fraud was intended (e).

Amount of
negligence
required to
postpone.

1193. But the person who has stood by, or allowed the subsequent security, must have been *aware of his own rights*; for it is his personal misconduct which binds him, and this does not exist if he be ignorant of his rights (f). On the other hand, a dictum of *Kay, J.*, in *Taylor v. Russell* (g), that negligence necessary to postpone a prior equitable incumbrancer, must be so gross as to render him responsible for the fraud committed on the second mortgagee, was questioned by Lord *Macnaughten*, on appeal to the House of Lords (h), and, with great respect, appears to be erroneous (1200).

Negligence
on both sides.

1194. It has been said that the argument of negligence against negligence, like that of estoppel against estoppel, sets the matter at large (i).

The circumstance that an incumbrancer has wilfully obstructed a creditor in carrying on proceedings upon the completion of which he would have been entitled to a charging order, has been held not to deprive the former of the benefit of his securities (k).

Creditors of
bankrupt
who allowed
him to trade

1195. The case of a bankrupt, who is suffered by his creditors to carry on business, and to receive the profits without first obtaining his certificate, falls within the principle, that if a man having

(b) *Stronge v. Hawkes*, 4 De G. M. & G. 186. And see *Commissioners of Public Works v. Harby*, 23 Beav. 508.

(c) *Osborn v. Lea*, 9 Mod. 96.

(d) *Att.-Gen. v. Cox*, 3 H. L. C. 240.

(e) *Low v. Bouverie*, [1891] 3 Ch. 32; overruling *Slim v. Croucher*, 2 Giff. 37, (affirmed) 1 De G. F. & J. 518).

(f) *Cockell v. Taylor*, 15 Beav. 103.

(g) [1891] 1 Ch. 8.

(h) *Taylor v. Russell*, [1892] A. C. at p. 262; and see also *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1; *Farrand v. Yorkshire Banking Co.* 40 Ch. D. 182; and *per STIRLING, L.J.*, in *Taylor v. London and County Banking Co.*, [1901] 2 Ch. at p. 260; and *conf. Re Castell and Brown, Ltd.*, *Roper v. The Co.*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co. Ltd.*, *Ward v. The Co.*, [1903] 2 Ch. 654.

(i) Co. Litt. 352 b, *per STUART, V.-C.*, *Ware v. Lord Egmont*, 18 Jur. at p. 373, on appeal 4 De G. M. & G. 460. See *Wrout v. Dawes*, 25 Beav. 369; *Withington v. Tate*, L. R. 4 Ch. 288.

(k) *Shaw v. Neale*, 20 Beav. 157, on appeal 6 H. L. C. 581.

a lien stand by during the making of a new security, he shall be postponed; and the former creditors will be postponed to those who are subsequent to the bankruptcy (*l*). And notice of the fact that the bankrupt is so carrying on business will be imputed to the former creditors, if it appear that the bankrupt have paid off some of them, and that one of those paid was an assignee under the bankruptcy (*m*).

Paragraphs
1195—1198

are postponed
to new
creditors.

1196. So if the vendor of an estate, having notice that it was bought with trust money, leave part of the price under the absolute control of one of the trustees, without the concurrence of the others, or of the *cestuis que trust*, he cannot, as against the other trustees or the *cestuis que trust*, claim a lien on the estate for the unpaid part of the purchase-money (*n*).

Vendor
allowing one
of several
purchasing
trustees to
retain price
loses lien.

1197. The directors or other officers of a joint-stock company who neglect to comply with the enactment (*o*) which requires mortgages and charges upon the property of the company to be registered, can set up their unregistered securities against the general creditors of the company, unless it be shown that a subsequent incumbrancer was thereby misled into believing that the property was unincumbered; for the security itself is not made void by the neglect to comply with the Act, which merely imposes penalties (*p*). And it would seem that in any event shareholders or others, having unregistered securities, are not affected by the neglect of the officers of the company to effect the registration (*q*); nor are directors when they have instructed the secretary of the company to make the entry (*r*); nor the assignee of a director who is a stranger to the company (*s*); nor partners who are mortgagees when all of them are not officers of the company (*t*): and if the mortgagee has already realized his security before the winding-up he cannot be required to refund (*u*).

Officers of
public com-
panies who
omit to
register their
mortgages,
are not
postponed.

1198. An incumbrancer will not lose his priority by omitting to make advances necessary for the recovery of the fund which

Equitable
incumbrancer

(*l*) *Tucker v. Hernaman*, 4 De G. M. & G. 395; *Troughton v. Gitley*, Amb. 630.

(*m*) *Tucker v. Hernaman*, *supra*.

(*n*) *White v. Wakefield*, 7 Sim. 401.

(*o*) Companies Act, 1862, s. 43, now embodied in s. 100 of the Companies Consolidation Act, 1908.

(*p*) *Wright v. Horton*, 12 App. Cas. 371; overruling *Re Patent Bread Machinery Co., Exp. Valpy and Chaplin*, L. R. 7 Ch. 289; *Re Wynn Hall Coal Co., Exp. North and South Wales Bank*, L. R. 10 Eq. 515; *Re Native Iron Ore Co.*, 2 Ch. D. 345; and approving reasoning of JESSEL, M.R., in *Re Globe, etc., Co.*, 48 L. J. Ch. 295.

(*q*) *Re General Provident Assurance Co., Exp. National Bank*, L. R. 14 Eq. 507; *Re General South American Co.*, 2 Ch. D. 337.

(*r*) *Re Borough of Hackney Newspaper Co.*, 3 Ch. D. 669.

(*s*) *Re International Pulp and Paper Co., Knowles' Mortgage*, 6 Ch. D. 556.

(*t*) *Re South Durham Iron Co.*, 11 Ch. D. 579.

(*u*) *Re Borough of Hackney Newspaper Co.*, *supra*.

Paragraphs
1198—1199
is not postponed by
refusing to
make salvage
advances.

is the subject of the security, and to answer or notice communications by the mortgagor's agent informing him of the necessity for such advances, unless distinct notice be given, that if no advances be made a new charge will be created ; especially if the subsequent incumbrancer have taken the security without inquiry into the prior rights (*x*). But the first incumbrancer will not be allowed the benefit of advances made by the other, without paying him the amount of his advances with interest (*y*).

Coverture and
infancy does
not excuse
fraud.

1199. Coverture being no excuse for fraud, a wife, who fraudulently enables her husband to raise money on her estate, will be postponed to the mortgagee (*z*). And if a married woman, representing herself to be single, execute a mortgage in that character, the court, as against her, if she survive her husband, and as against her heir or other person claiming only as a volunteer through her if she do not survive her husband, will give the mortgagee a specific charge upon the property upon which he was induced by the fraud to lend his money (*a*). And so of an infant ; if he be old and cunning enough to carry out a fraud, he must make satisfaction. Therefore, if an infant remainderman, being almost of full age, be active in persuading a person to lend money on the security of a mortgage in fee, knowing the mortgagor to be but tenant for life, he shall not afterwards claim as remainderman against the mortgagee (*b*). But a security by an infant, accepted upon a false declaration that he was of full age, cannot be supported upon this principle against a subsequent mortgage made after he attained full age, to a mortgagee without notice (*c*).

(*x*) *Myers v. United Guarantee and Life Assurance Co.*, 1 Jur. (N.S.) 833.

(*y*) *Id.*

(*z*) *Evans v. Bicknell*, 6 Ves. 174 ; *Sharpe v. Foy*, L. R. 4 Ch. 35.

(*a*) *Vaughan v. Vanderstegen*, 2 Drew. 363, 379 ; *Sharpe v. Foy*, L. R. 4 Ch. 35 ; *Re Lush's Trusts*, L. R. 4 Ch. 591. And see now the Married Women's Property Act, 1882, ss. 2, 5, 12, 19. But query whether this will be so where she is restrained from anticipation ; see *Stanley v. Stanley*, 7 Ch. D. 589.

(*b*) *Watts v. Cresswell*, 9 Vin. Abr. 415, pl. 24. And see *Cory v. Gertcken*, 2 Mad. 40 ; and *Clare v. Earl of Bedford*, 13 Vin. Abr. 536, 537. In the first case cited the defendant is said to have been privy to a further advance after he came of age.

(*c*) *Inman v. Inman*, L. R. 15 Eq. 260. And see the Infants Relief Act, 1874, c. 62.

SECTION III.

Paragraph
1200

The Effect upon Priority between Equitable Incumbrancers of possession of the Title Deeds.

	PARAGRAPH
<i>Possession of title deeds often settles questions of priority</i>	1200
<i>Entire absence of inquiry for deeds almost fatal</i>	1201
<i>Positive fraud</i>	1202
<i>Failure to obtain deeds through deceit or neglect of mortgagor</i>	1203
<i>Cases where mortgagor has not custody of deeds or is bound to keep them</i>	1204
<i>Deeds fraudulently handed to legal mortgagee do not give him priority if inquiry would have disclosed fraud</i>	1205
<i>Mortgagee giving up possession of title deeds</i>	1206
<i>Mortgagee does not lose priority if deeds given to mortgagor by third party</i>	1207
<i>Mortgagee does not lose priority by solicitor fraudulently pledging deeds</i>	1208
<i>Question whether subsequent incumbrancer entitled to hold deeds against prior one</i>	1209

1200. Both in legal and equitable mortgages the possession of title deeds is of great importance as regards priority ; and may alone be a sufficient test of right, where by simultaneous mortgages the legal estate passes to several mortgagees (*d*), or where the equities between the incumbrancers are equal. An equitable, and (under aggravated circumstances) (*dd*) a legal (1122) mortgagee may lose his priority, if he fail to obtain or inquire for (*e*), or, if having obtained, he give up without good reason, the possession of the title deeds. For by the mortgagor's possession of the deeds, which are the evidences of title to the land, the subsequent lender is led to believe, that the estate to which they belong is free from charge ; although at law the rightful owner of the land may recover the deeds in trover from a person who has lent money on them without notice of a want of title in the depositor, notwithstanding negligence on the part of the owner, provided it do not amount to fraud (*f*). It appears to have been formerly thought by common law judges (*g*), that the fact that the mortgagor had been able by possession of the deeds to effect another security, was alone sufficient in courts of equity to postpone a prior mortgagee. But in a case (*h*) decided in equity before this doctrine was set up, and in which the first mortgagee had trusted to the word of the mortgagor, who said that the deeds were in the country, but should be given him, the first mortgagee did not lose his priority ; though, because he had been negligent, the court would not deprive the other of the deeds.

Possession of title deeds often settles questions of priority.

(*d*) *Hopgood v. Ernest*, 3 De G. J. & S. 116.
(*dd*) *Oliver v. Hinton*, [1899] 2 Ch. 264 ; *Berwick & Co. v. Price*, [1905] 1 Ch. 638 ; *Walker v. Linom*, [1907] 2 Ch. 104.
(*e*) *Rice v. Rice*, 2 Drew. 73 ; *Layard v. Maud*, L. R. 4 Eq. 397 ; *Re Castell and Brown, Ltd., Roper v. The Co.*, [1898] 1 Ch. 315 ; *Re Valletort Sanitary Steam Laundry Co., Ltd., Ward v. The Co.*, [1903] 2 Ch. 654.
(*f*) *Harrington v. Price*, 3 B. & Ad. 170.
(*g*) *BURNET, J.*, in *Ryall v. Rolle*, 1 Atk. 165 ; *BULLER, J.*, in *Goodtitle v. Morgan*, 1 T. R. 755, 762.
(*h*) *Head v. Egerton*, 3 P. Wms. 280.

Paragraphs
1200—1201

But, probably, now the deeds would be ordered to be handed over (*i*). And, at the present day, either direct fraud, or negligence so gross as either to amount to evidence of fraud, or to make it inequitable for the prior legal incumbrancer to rely on his legal estate (*j*), must be proved against a prior legal mortgagee, by him who seeks to disturb his priority (*k*) (1122). In *Taylor v. Russell* (*l*) Kay, J., seem to have thought that the same amount of negligence was required to postpone a prior equitable, as that required to postpone a prior legal mortgagee (587, 1193). But this view was questioned on appeal to the House of Lords (*m*), and appears to be scarcely consistent with subsequent cases (*n*), except perhaps *Walker v. Linom* (*j*). However, where the relation between the equitable incumbrancer and the person in possession of the title deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature—as for example that of *cestui que trust* and trustee, or client and solicitor—there is a great body of authority to show that the equitable incumbrancer is not to be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose that there has been any want of good faith on the part of the custodian of the deeds (*o*).

Entire
absence of
inquiry for
deeds almost
fatal.

1201. But although a *prior* legal mortgagee will not be deprived of his priority unless his negligence be gross, the same rule does not apply where a *subsequent* legal mortgagee is attempting to deprive a prior equitable mortgagee of his priority. For if it be shown that he has not inquired for the deeds (*p*), or at all investigated the title (*q*), such gross negligence is held to render it unjust to deprive the prior mortgagee of his security; and of course this view is (*r*) strengthened, if the legal mortgagee be aware that persons in the situation of the mortgagor are accustomed to raise money on deposit of their title deeds. In the case of a mortgage of copyholds (*s*), the surrenderee not having

(*i*) *Manners v. Mew*, 29 Ch. D. 725. *Re Ingham, Jones v. Ingham*, [1893] 1 Ch. at p. 361.

(*j*) *Walker v. Linom*, [1907] 2 Ch. 104, where the authorities on this vexed question were elaborately reviewed by Parker, J.

(*k*) *Evans v. Bicknell*, 6 Ves. 174; *Hewitt v. Loosemore*, 9 Hare, 449; *Bailey v. Fernor*, 9 Price, 262; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652; *Northern Counties, etc., Insurance Co. v. Whipp*, 26 Ch. D. 482; *Re Greer*, [1907] 1 I. R. 57. Whether this is so in the case of equitable mortgagees, *quære* see (587) *supra*.

(*l*) [1891] 1 Ch. 8; and Parker, J., in *Walker v. Linom*, *supra*, seems to favour this view. (*m*) [1892] A. C. at p. 262.

(*n*) *Re Castell and Brown, Ltd., Roper v. The Co.*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co., Ltd., Ward v. The Co.*, [1903] 2 Ch. 654, in both of which debenture holders who had left deeds in the Company's custody were postponed to subsequent mortgagees by deposit. But conf. *Walker v. Linom*, *supra*.

(*o*) *Per STIRLING, L.J., Taylor v. London and County Banking Co.*, [1901] 2 Ch. at p. 261; and see *Oliver v. Hinton*, [1899] 2 Ch. 264, and *Walker v. Linom*, *supra*.

(*p*) *Hewitt v. Loosemore*, *supra*; see *Wiseman v. Westland*, 1 Y. & J. 117; *Maxfield v. Burton*, L. R. 17 Eq. 15; and see *Garnham v. Skipper*, 55 L. J. Ch. 263.

(*q*) *Worthington v. Morgan*, 16 Sim. 547

(*r*) *Berwick & Co. v. Price*, [1905] 1 Ch. 632; *Oliver v. Hinton*, [1899] 2 Ch. 264.

(*s*) *Whitbread v. Jordan*, 1 Y. & Coll. Ex. 303.

inquired for the deeds which were in deposit, was postponed, though he had ascertained that there were no incumbrances entered on the rolls. But priority will not be forfeited by the neglect of the mortgagee, or his solicitor, to obtain or inquire for an instrument recited in a deed of remote date which forms the root of the title, if there were no wilful neglect on the mortgagee's part, though his solicitor, being also the agent of the mortgagor, knew that by means of such instrument the mortgagor could raise money (*t*). Nor where, from the smallness of the purchase-money and other circumstances, the cost of investigation of title would have made it practically impossible (*u*).

1202. Less doubt will of course be felt, where the parties have been guilty of positive fraud (*x*),—as by ante-dating the legal mortgage (that it might not appear to have been made on the eve of the mortgagor's bankruptcy), and falsely reciting, that it related to a present advance; and if the subsequent mortgagee, knowing of the prior deposit of the deeds, made no inquiry as to the object of that deposit. Positive fraud.

1203. But if the mortgagee have not neglected to inquire for the deeds, and have failed to obtain them through the deceit or neglect of the mortgagor,—as if the latter assure him that he has delivered him all the deeds (*y*), or that he will shortly do so (*z*), making a reasonable excuse for not doing it at the moment, it has been determined that the mortgagee, whether his security be legal or equitable, (and even though the relation of solicitor and client subsisted between him and the borrower,) will not be postponed to a person, who, by reason of the mortgagor's possession of the deeds, has been induced to purchase or lend money on the security of the property. Nor will he if, upon making proper inquiry respecting a deed of the existence of which he has notice, a reasonable excuse is made for its non-production, and the mortgagee is assured and believes, that it does not affect the estate in which he is interested (*a*). The question what is a reasonable excuse must always be decided upon the circumstances of the case. Some of the decisions cited Failure to obtain deeds through deceit or neglect of mortgagor.

(*t*) *Finch v. Shaw, Colyer v. Finch*, 18 Jur. 935, affirmed (*sub nom. Colyer v. Finch*), 5 H. L. C. 905. See *Hunter v. Walters*, L. R. 7 Ch. 75.

(*u*) *Kettlewell v. Watson*, 21 Ch. D. 685.

(*x*) *Birch v. Ellames*, 2 Anst. 427.

(*y*) *Penner v. Jemmatt*, 2 Bro. C. C. 652, n.; *Roberts v. Croft*, 2 De G. & J. 1; *Hunt v. Elmes*, 28 Beav. 631; *Dixon v. Muckleston*, L. R. 8 Ch. 155.

(*z*) *Hewitt v. Loosemore*, 9 Hare, 449; *Espin v. Pemberton*, 4 Drew. 333.

(*a*) *Jones v. Smith*, 1 Ph. 244. The same has been held (*Frazer v. Jones*, 5 Hare, 481) where no inquiry had been made; but in that case, there having been a false recital in the mortgage, of a prior equitable charge by deposit of a deed, none such having ever been made, the decision went on the ground, that subject to the alleged charge if it had existed, and in fact as it did not exist, the whole of the mortgagor's interest in the equity of redemption (which was the subject of the security) was vested in the present mortgagee, and the mortgagor had nothing which in equity he could transfer to the subsequent deposites. It was also (on appeal) partly decided on the ground of fraud in the latter person.

Paragraphs above, which have allowed excuses for the giving up deeds, or for
 1203—1205 accepting any false statements which the borrower chooses to make about them, have made it easier for mortgagors to defraud subsequent lenders than for the latter to protect themselves by ordinary vigilance, and do not appear to harmonize with the rule *vigilantibus non dormientibus jura subveniunt* (b). In some recent cases, however, false statements as to the place or nature of the custody of the deeds have been held not to relieve the person who accepts them from notice of the real facts, when by inquiry the truth could have been easily discovered (c).

Cases where mortgagor has not custody of deeds, or is bound to keep them.

1204. In some cases, also, the mortgagor himself may be either not entitled to the sole possession of the deeds, or may be bound to retain them in his own custody. The first is the case of tenants in common and joint tenants; the other may be where the estate is in trust,—as where, although the deeds were in the hands of a *cestui que trust*, the estate was vested in the trustees, and was subject to a term for securing a jointure and portions (d). Or the case may be such that the possession of the deeds is not legally incident to the estate of the mortgagee, as where he is reversioner and the deeds are held by the tenant for life (e). Or (f) the security may be made by trustees in part execution of a trust to raise a larger sum, and for other purposes for which possession of the deeds was absolutely necessary; so that without a breach of trust they could not have parted with them. In none of these cases can the legal mortgagee be blamed for not obtaining possession of the deeds.

Deeds fraudulently handed to legal mortgagee do not give him priority if inquiry would have disclosed fraud.

1205. Where the deeds are forthcoming to the legal mortgagee through the fraud of the holder of them and through the delay of the persons rightfully entitled to take possession of them, yet those persons will not, it has been said, be postponed to even a legal mortgagee, if he, by inquiry, could have ascertained that they were in wrong hands. Therefore where assignees in bankruptcy omitted for a long period to take possession of their insolvent's copyhold, and caused no entry of the assignment or copy of the appointment of the assignee to be entered on the rolls, but out of compassion left the insolvent in possession of the property, and of the copies of court roll, and he made a conditional surrender the assignees were not postponed (g):

(b) See cases cited in notes (y) and (z) on previous page.

(c) *Maxfield v. Burton*, L. R. 17 Eq. 15; *Spencer v. Clarke*, 9 Ch. D. 137; but see *Agra Bank v. Barry*, L. R. 7 H. L. 135.

(d) 1 Fonbl. Eq. 262, n.; per Lord ELDON, in *Evans v. Bicknell*, 6 Ves. at p. 190; *Farrow v. Rees*, 4 Beav. 18. See *Cottam v. Eastern Counties Rail. Co.*, 6 Jur. (N.S.) 1367. In the last case it was said by WOOD, V.-C., to have been held in *Gibson's Case* not to be laches for the trustees to leave their deeds in the hands of one of them.

(e) *Tourle v. Rand*, 2 Bro. C. C. 649.

(f) *Harper v. Faulder*, 4 Mad. 129.

(g) *Cole v. Coles*, 6 Hare, 517; see also *Horlock v. Priestly*, 2 Sim. 75; and *conf. Wadling v. Oliphant*, 1 Q. B. D. 145; *Exp. Ford, Re Caughey*, 1 Ch. D. 521; and *Re Clark, Exp. Beardmore*, [1894] 2 Q. B. 393.

on the ground, that the mortgagee might have searched the list of insolvent debtors, and that the statutes directing the entries on the rolls were directory only. By this case the doctrine in favour of the prior incumbrancers was perhaps carried to its full extent against a person, who, after a period of nineteen years from an insolvency, found the insolvent in full possession and the apparent owner of the estate. And it may be thought that if the compassion of the assignees was to lead to such a result, it was gross neglect towards the rest of the world ; especially as they might have made the necessary entry on the rolls, and have still left the insolvent in possession of the estate. It shows, however, the necessity of careful inquiry on the part of the mortgagees.

Paragraphs
1205—1207

1206. The same principles apply in cases in which the mortgagee has had, but has afterwards given up, the possession of the title deeds. If, under the circumstances, it can be inferred that he did it fraudulently, or if gross negligence can be imputed to him, (as, for instance, if he deliver the deeds to enable the mortgagor to make a limited security, which by consent of the original mortgagee shall take precedence of his own, and a larger sum be raised ; or to make a second mortgage upon the faith that the mortgagor will disclose the first, which he omits to do ;) the original mortgagee (*h*) will be postponed not only in favour of the particular incumbrancer, who, by his conduct, has been induced to advance money on the estate, but in favour of all later incumbrancers, who, after making proper inquiries as to the deeds, have lent their money in ignorance of the original security (*i*). And so a sub-mortgagee, who gives up the deeds to the original mortgagee upon the faith of a promise by him to substitute others for them, loses his security if the deeds are restored to the mortgagor when he pays off the debt without notice of the sub-mortgage (*k*).

Mortgagee
giving up
possession
of title deeds.

1207. But if the deeds come to the mortgagor's hands without fraud or neglect by the mortgagee ; as, for instance, by the wrongful act of a third person to whom he had properly delivered them (*l*), or through misrepresentation on the part of the mortgagor,—as that he wanted the deeds to enable him to grant a building lease (*m*) advantageous to the estate, or to show the lease to an

Mortgagee
does not lose
priority if
deeds given
to mortgagor
by third
party.

(*h*) *Perry-Herrick v. Attwood*, 25 Beav. 216 ; app. *Brocklesby v. Temperance Permanent Building Society*, [1895] A. C. 173 ; *Briggs v. Jones*, L. R. 10 Eq. 92 ; foll. and expl. *Re Lambert*, 11 L. R. Ir. 534. It seems to have been considered that the first case was not one of negligence ; but the precautions which should have been taken are so obvious that it is difficult to find any more appropriate term. The mortgagee, in such a case, cannot bring trover for the deeds for want of the right of possession. *Owen v. Knight*, 5 Scott. 307.

(*i*) *Perry-Herrick v. Attwood*, *supra* ; *Clarke v. Palmer*, 21 Ch. D. 124.

(*k*) *Re Lord Southampton's Estate*, *Allen v. Lord Southampton*, 16 Ch. D. 178.

(*l*) *Exp. Meux*, 1 Gl. & J. 116. *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231 ; *Cory v. Eyre*, 1 De G. J. & S. 149, *Re Vernon Ewens & Co.*, 33 Ch. D. 402.

(*m*) *Peter v. Russell*, 2 Vern. 726.

Paragraphs intended purchaser (*n*), that he might ascertain the nature of the
 1207—1209 covenants, after which it should be returned,—the legal mortgagee's priority will be saved, provided he be diligent in regaining possession of the deeds according to the mortgagor's representation. For if he neglect to demand them, or otherwise acquiesce in the loss of possession, he will be postponed as if the deeds had been at first given up improperly; and this conclusion was strengthened where the prior mortgagee claimed by transfer from the original mortgagee, and, having been his solicitor at the time of the transaction, had given up the deeds without his consent (*o*). The prior mortgagee will not be postponed, where it cannot be discovered by what means the deeds came back into the mortgagor's possession, provided there be nothing to show that he was enabled by the first mortgagee to commit the fraud; the mere possession of the deeds by the mortgagor without evidence that he got them through the neglect or fraud of the mortgagee not being enough to postpone the latter (*p*).

Mortgagee does not lose priority by solicitor fraudulently pledging deeds.

1208. The mere fact of an equitable mortgagee leaving his deeds in the hands of his solicitor, who fraudulently pledges them, is not evidence of negligence sufficient to postpone the mortgagee (*q*). If it were so, the mere creation of an equitable mortgage by deposit would expose the mortgagor to the risk of his mortgagee fraudulently encumbering the property (**1200**).

Question whether subsequent incumbrancer entitled to hold deeds against prior one.

1209. The right of a mortgagee who has obtained possession of the deeds to retain them, although he is postponed to another incumbrancer, was formerly the subject of much doubt. Although the right to hold the deeds properly follows the ownership of the land (*r*), it was said that, being chattels, the person in actual possession might deal with them subject to the rights of the true owner; and that a court of equity would not interfere with the possession of a person who had obtained them for valuable consideration without notice of a wrongful title, but would leave the owner *to his remedy at law* (*s*).

However, since the Judicature Acts the Chancery Division of

(*n*) *Martinez v. Cooper*, 2 Russ. 198; and see *Hall v. West End, etc., Co.*, 1 Cab. & El. 161.

(*o*) *Waldron v. Sloper*, 1 Drew. 193; dist. *Re Vernon Ewens & Co.*, 33 Ch. D. 402; *Dowle v. Saunders*, 2 H. & M. 242.

(*p*) *Allen v. Knight*, 5 Hare, 272; on app. 11 Jur. 527; *Carter v. Carter*, 3 K. & J. 617; but see *Pilcher v. Rawlins*, L. R. 7 Ch. 259; *Hartop v. Huskisson*, 55 L. T. 773.

(*q*) *Re Vernon Ewens & Co.*, 33 Ch. D. 402. *Taylor v. London and County Banking Co.*, [1901] 2 Ch. at p. 261; *Shropshire Union Railways and Canal Co. v. Reg.*, L. R. 7 H. L. 496; *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263.

(*r*) See *Smith v. Chichester*, 2 Dru. & War. 393; *Fagg v. James*, 8 L. T. (N.S.) 5; *Heath v. Crealock*, L. R. 10 Ch. 22; *Newton v. Newton*, L. R. 4 Ch. 142; *Hunt v. Elmes*, 2 De G. F. & J. 578; *Waldy v. Gray*, L. R. 20 Eq. 238.

(*s*) *Joyce v. De Moleyns*, 2 Jo. & Lat. 374; *Wallwyn v. Lee*, 9 Ves. 24.

the High Court, in the exercise of its jurisdiction as a court of law, will order the deeds to be delivered to the owner of the legal title, who has been wrongfully deprived of them (*t*) (1200). Paragraphs
1209—1210

SECTION IV.

The Effect on the Priority of Equitable Securities of the Right to Consolidate.

	PARAGRAPH
<i>General doctrine as to consolidation</i>	1210
<i>Doctrine now much curtailed</i>	1211
<i>Principle of consolidation sound</i>	1212
<i>Doctrine as applied to securities not governed by Conveyancing Act, 1881</i>	1213
<i>Purchaser of equity of redemption is free from danger of consolidation where none possible at date of his purchase</i>	121
<i>Right to consolidate not affected by mortgagee selling one of the estates</i> ..	1215
<i>Mortgagee may consolidate against assignee of equity of redemption without notice</i>	1216
<i>Effect of doctrine is to throw debt on estate never subjected to it</i>	1217
<i>Case where equity of redemption of one estate is sold, and of the other is mortgaged</i>	1218
<i>Undivided shares treated as separate estates for purposes of consolidation</i>	1219
<i>The mortgages must have been made by the same mortgagor</i>	1220
<i>No consolidation where a charge is sub-mortgaged as against persons entitled to the estate charged</i>	1221
<i>Legal estate not essential to consolidation</i>	1222
<i>Right to consolidate overrides right of surety to be indemnified</i>	1223
<i>Securities on different kinds of property may be consolidated</i>	1224
<i>Mortgagor cannot take advantage of consolidation as against puisne mortgagees</i>	1225

1210. It has for many years been an established rule in equity that if the owner of different estates mortgage them to one person, separately, for distinct debts, or successively, to secure the same debt, or the same debt with further advances, the mortgagee, so long only as both securities exist (*u*), may insist that one security shall not be redeemed alone (*x*). The principle is that, redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee, and redeem him entirely (*y*)—not taking one of his securities, and leaving him exposed to the risk of deficiency as to the other. General
doctrine
as to
consolidation.

This doctrine was acted upon by courts of law, in applications under the statute of Geo. 2 to stay proceedings, on payment of principal, interests and costs (*z*); and it appears to have been recognized in other proceedings at law (*a*). It depends upon a

(*t*) *Re Cooper, Cooper v. Vesey*, 20 Ch. D. 611; *Manners v. Mew*, 29 Ch. D. 725.

(*u*) *Re Raggett, Exp. Williams*, 16 Ch. D. 117; *Re Gregson, Christison v. Bolam*, 36 Ch. D. 223.

(*x*) *Shuttleworth v. Laycock*, 1 Vern. 245; *Pope v. Onslow*, 2 Vern. 285; *Jones v. Smith*, 2 Ves. Jun. 372; *Collett v. Munden*, cited there at p. 377.

(*y*) *Willie v. Lugg*, 2 Eden, 78.

(*z*) *Roe d. Kaye v. Soley*, 2 W. Bl. 725.

(*a*) See *Marcon v. Bloxam*, 11 Ex. 586.

Paragraphs
1210—1212 principle altogether different from that upon which the doctrine of tacking, properly so called, is founded ; although the circumstance, that the union of two or more securities is common to both, has caused it sometimes to be treated as a branch of that doctrine. In tacking, the right is to throw several debts (one or more of which are either lent upon inferior securities on the *same* estate, or are mere specialty debts), upon the protection of the legal estate, the dominion over which is the very foundation of the right (1135). But the right which is now to be considered, depends upon the equitable principle that he who seeks the aid of the court must do equity himself ; and it enables a mortgagee to unite, and to hold united, securities on *different* estates until payment of the debts charged on both of them—to make one estate liable for a debt specifically charged on another. To give a right to tack, one debt only needs to have been lent on the credit of the estate (1146) ; it is sufficient that the other be merely a lien upon it ; and where the doctrine of circuitry applies (1165), even that is unnecessary. But the essence of the other doctrine is, that there shall be several estates, each specifically liable for a particular debt. To the one, notice at the time of the advance is fatal (1153) ; in the other, the right belongs to a mortgagee, who has taken several securities from the same mortgagor, and who, therefore, of necessity, has notice of the first mortgage, when he takes the second.

Doctrine
now much
curtailed.

1211. By means of so-called logical deductions, the original doctrine of consolidation became so extended as to cause an intolerable grievance to persons dealing with estates in mortgage, and the courts have of late years been inclined to restrict its application as much as possible. And as to securities dated after December 31st, 1881, unless a contrary intention is expressed in the mortgage deeds, or one of them, the doctrine has been entirely abolished by the provision of the Conveyancing Act, 1881, s. 17, so that a mortgagor (which includes any person entitled to redeem a mortgage or charge) may redeem any one mortgage, without paying any money due under any separate mortgage made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. An undertaking by an equitable mortgagee to execute a legal mortgage with all such powers and provisions and in such form as the mortgagee may require does not entitle the latter to have the above section negatived (b).

Principle of
consolidation
sound.

1212. The principle upon which consolidation was originally founded appears to be perfectly sound, inasmuch as it only secured the repayment by the mortgagor of money which he had borrowed from, or for which he was otherwise indebted to the mortgagee,

(b) *Whitley v. Challis*, [1892] 1 Ch. 64 ; *Farmer v. Pitt*, [1902] 1 Ch. 954.

and which he was morally bound to pay ; and to this extent it is considered that mortgagees may properly take advantage of the opportunity given them to contract themselves out of the Act. Paragraphs
1212—1214

1213. As to the effect of the doctrine of consolidation, as now accepted by the courts, upon securities either dated before the Conveyancing Act, 1881, or expressly exempted from the operation of that Act, the mortgagee is entitled to consolidate, whether the action be by a person who is actively seeking the aid of equity to redeem, or in a foreclosure suit, in which the mortgagor can redeem only upon the same terms as if he were suing for redemption ; or in bankruptcy, whether the application to the court be by the mortgagee himself or not (*c*). But if the mortgagor has not made default in one of the mortgages, so that no right of foreclosure has arisen upon it, the mortgagee cannot, upon notice by the mortgagor to pay off the other, obtain a declaration that he is entitled to consolidate (*d*). Doctrine as
applied to
securities not
governed by
Conveyanc-
ing Act, 1881.

The mortgagee has a right to the benefit of this rule, though the securities be made to trustees, and even where they are made to different sets of trustees (*e*). And if the mortgages be made to different mortgagees, one of whom takes an assignment from the other of his security, the securities may be united, whether the assignee had an interest which entitled him to require an assignment (as where he was surety for that debt (*f*)), or whether he had no such interest (*g*).

1214. The assignee of the equity of redemption takes subject to the possibility of *existing* mortgages being consolidated ; but the mortgagor cannot by any *subsequent* dealing, prejudice the rights of his assignee (*h*). The purchaser of the equity of redemption therefore takes, subject only to the equities which existed at the date of the conveyance to him ; and is not affected by possibilities of equities, which are dependent upon future and uncertain dealings with the property. There is, therefore, no right of consolidation against him where the mortgage of the second estate was made *after* the mortgagor had assigned the equity of redemption of that which was first mortgaged, nor where the securities have become united Purchaser of
equity of
redemption
free from
danger of
consolidation
where none
possible at
date of his
purchase.

(*c*) *Tribourg v. Lord Pomfret*, cited Ambl. 733 ; *Exp. Berridge*, 3 Mont. D. & De G. 464 ; *Watts v. Symes*, 1 De G. M. & G. 240 ; *Selby v. Pomfret*, 7 Jur. (N.S.) 836, 860 ; notwithstanding *Smeathman v. Bray*, 15 Jur. 1051 ; *Holmes v. Turner*, 7 Hare, 367, n. The terms of redemption are the same, whether the suit be for redemption or foreclosure (*Du Vigier v. Lee*, 2 Hare, 326 ; *Mosley v. Baker*, 6 Hare, 87, affirmed 3 De G. M. & G. 1032).

(*d*) *Cummins v. Fletcher*, 14 Ch. D. 699.

(*e*) *Tassell v. Smith*, 2 De G. & J. 713.

(*f*) *Tweedale v. Tweedale*, 23 Beav. 341.

(*g*) *Vint v. Padgett*, 1 Giff. 446 (affirmed 2 De G. & J. 611) ; foll. *Pledge v. White*, [1896] A. C. 187 ; and see *Re Salmon, Exp. The Trustee*, [1903] 1 K. B. 147.

(*h*) *Harter v. Colman*, 19 Ch. D. 630 ; *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460.

Paragraph
1214

only after the separation of the equities of redemption of the several estates (*i*). And on the same principle where (even before 1893) a voluntary settlor mortgaged the settled estate (which gave the mortgagee priority over the settlement *pro tanto*), the mortgagee could not consolidate the mortgage with another, inasmuch as the equity of redemption was left in the *cestui que trust* under the settlement, and never belonged to the mortgagor at all (*k*).

But where the equities of redemption of two estates (separately mortgaged) become united in the hands of a second mortgagee, or a purchaser, a *subsequent* transferee of the two separate first mortgages is entitled to consolidate (*l*) (even although the transferee of the prior securities took with notice of the second mortgage, because the second mortgagee must be considered to have known that the securities might coalesce. As Lord *Davey* put it in *Pledge v. White* (*m*), the doctrine of consolidation is applicable "where, at the date when redemption is sought, all the mortgages are united in one hand and redeemable by the same person, or where, *after that state of things has once existed*, the equities of redemption have become separated. If the purchaser of two or more equities of redemption desires to prevent consolidation, he has it in his power to redeem any one mortgage before consolidation takes place; but if for his own convenience he delays doing so, he runs the same risk as his assignor ran, of the mortgages becoming united by transfer, in one hand." The union of the mortgages in one hand is essential. Thus if one mortgage is vested in A. and the other in A. and B. on joint account no consolidation can take place (*n*).

There will be no consolidation against subsequent mortgagees of the first estate, where the security on the second estate was not in existence at the date of their mortgages, and the mortgagee of the second estate had notice of these subsequent mortgages when he took his assignment of the first mortgage (*o*). And *à fortiori* will this be so where a second mortgagee of two properties, A. and B., consents to allow the first mortgagees of property A. to make a further advance in priority to him, and those first mortgagees subsequently endeavour to consolidate their mortgage on A. with

(*i*) *Jennings v. Jordan*, 6 App. Cas. 698; *Hughes v. Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607; *Baker v. Gray*, 1 Ch. D. 491; *Minter v. Carr*, [1894] 3 Ch. 498; *White v. Hillacre*, 3 Y. & C. 597; *Harter v. Colman*, 19 Ch. D. 630; notwithstanding *Tassell v. Smith*, 2 De G. & J. 713; and *Beever v. Luck*, L. R. 4 Eq. 537; overruled by *Minter v. Carr*, *supra*.

(*k*) *Re Walhampton Estate*, 26 Ch. D. 391.

(*l*) *Vint v. Padgett*, 1 Giff. 446 (affirmed 2 De G. & J. 611).

(*m*) [1896] A. C. 187. But *conf. Minter v. Carr*, [1894] 3 Ch. 498, in which the principle was held not to apply where the second mortgagee was only mortgagee of one of the two properties.

(*n*) *Riley v. Hall*, 79 L. T. 244, STIRLING, J.

(*o*) *Baker v. Gray*, 1 Ch. D. 491.

a mortgage on property B., so as to throw the burden of the further advance on the latter property (*p*). Paragraphs
1214—1217

Nor does the right exist where one security has been satisfied before the other is complete (*q*).

1215. The right of the mortgagee is not affected by reason of his selling one of the estates under his power (*r*) ; or by an assignment taken after the bankruptcy of the mortgagor (though the holder of an original security *taken after notice* of the insolvent state of the mortgagor will not, in bankruptcy, be allowed to gain a preference by consolidating it with an earlier security for another debt (*s*)) ; or by any other change in the ownership of the equity of redemption, either by descent, sale, mortgage, or other devolution of the estates (*t*). Right to consolidate not affected by mortgagee selling one of the estates.

1216. The mortgagee may hold both (subject to the above restrictions), even against the purchaser or mortgagee of the equity of redemption of one of them without notice of the other mortgage, until payment of all that is due on both (*u*) ; and though the security of such a *puisne* mortgagee be earlier in date, but postponed for another consideration (*x*). The purchaser or other assignee may then hold until he be redeemed, both as to his own security and what he paid when he redeemed the original mortgagee (*y*). And if he has paid off the mortgagee who first claimed a right to consolidate, out of the purchase-money of one of the estates which he has sold, he is considered to have made the payment out of his own money to the extent to which the payment was made necessary by the original mortgagee's claim to consolidate (*z*). Mortgagee may consolidate even against assignee of equity of redemption without notice.

1217. A *puisne* mortgagee has thus the power of throwing his debt upon an estate, which the mortgagor never made subject to it. And where three estates, A., B., and C., were mortgaged (*a*), and then A. was sold, and the purchaser paid off the mortgage and got the legal estate ; it was held, that he might compel *puisne* Effect of doctrine to throw debt on estate which was never subjected to it.

(*p*) *Bird v. Wenn*, 33 Ch. D. 215.

(*q*) *Mayor of Brecon v. Seymour*, 26 Beav. 548 ; *Re Gregson, Christison v. Bolam*, 36 Ch. D. 223.

(*r*) *Selby v. Pomfret*, 1 Johns & H. 336 ; *Cracknall v. Janson*, 11 Ch. D. 1.

(*s*) *Exp. Hodgkin, Re Softley*, L. R. 20 Eq. 746.

(*t*) *Exp. Alsager, Re Breeds*, 2 Mont. D. & De G. 328 ; *Selby v. Pomfret*, *supra* ; *Margrave v. Le Hooke*, 2 Vern. 207 ; *Exp. Carter*, Ambl. 733 ; *Ireson v. Denn*, 2 Cox, Ch. Ca. 425 ; *Tribourg v. Pomfret*, cited Ambl. 733 ; *Titley v. Davies*, 2 Y. & Coll. C. C. 399 ; *Palk v. Lord Clinton*, 12 Ves. 48 ; *Cator v. Charlton*, cited 2 Ves. Jun. 377, and *Collet v. Munden*, cited 2 Ves. Jun. 377 ; *Fosbrooke v. Walker*, 2 L. J. (N.S.) Ch. 161, is contrary to the current of authorities.

(*u*) *Ireson v. Denn*, *supra* ; *Neve v. Pennell*, 2 H. & M. 170 ; *Cracknall v. Janson*, 11 Ch. D. 1. *Bradley v. Riches*, 39 L. T. 78. The report in 9 Ch. D. 189 does not touch this point.

(*x*) *Neve v. Pennell*, *supra*.

(*y*) *Titley v. Davies*, 2 Y. & Coll. C. C. 399 ; *Bovey v. Skipwith*, 1 Ch. Ca. 201.

(*z*) *Cracknall v. Janson*, 11 Ch. D. 1. (*a*) *Sober v. Kemp*, 6 Hare, 155.

Paragraphs mortgagees of B. and C., having also a security on another estate,
 1217—1219 D., to pay him all that he had paid to the first mortgagee, taking only a conveyance of B. and C., or to be foreclosed as to those estates.

But the redeeming assignee may be prevented from acquiring a right to hold both securities by the mortgagor if he should redeem the first mortgage himself; or by the first mortgagee if he should part with one of his securities before he is redeemed; for the estate being then no longer liable to his debt, the *puisne* mortgagee who redeems can get no title to it (b).

Case where equity of redemption of one estate sold, and of the other mortgaged.

1218. As to the right of *the assignee* to hold both estates, where, after the mortgage of both, one of them was sold, and the other mortgaged, Lord *Hardwicke* seems to have thought (c), that in such a case the equitable mortgagee may throw his debt upon the purchased estate, by redemption of the original mortgage, only when the sale is subsequent to, and not when it precedes, his mortgage; because, when the sale comes first, the mortgagor has no longer a right of redemption in him as to the estate sold, and can therefore convey none to the mortgagee. But he said, it would be different if that estate had only been mortgaged, for then the mortgagor could have passed his right of redemption. It is not, however, from the mortgagor that the assignee of the equity of redemption acquires the right to hold both estates; nor does the mortgagor in fact, upon making a second mortgage of one estate, pass his equity of redemption in the other; all that he passes, in the other estate, is a possibility, enabling the *puisne* mortgagee to get at that estate through the right which the first mortgagee has over it—by redeeming him, and getting the benefit of his securities. Now the prior mortgagee may clearly hold against the subsequent purchaser of the equity of redemption; for his security is prior to the sale. If then the assignee steps into his place, and derives his right through him (and he has no other equity), it does not appear why he may not hold against a purchaser as well as against a mortgagee (d). But it is not clear that the point was raised.

Undivided shares are treated as separate estates for purposes of consolidation.

1219. Where the whole estate was mortgaged to A. in 1821, to secure 6000*l.*, the equity of redemption being as to one-third in X., and as to two-thirds in Y.; and then in 1831, X.'s third was conveyed to B. to secure 12,000*l.*; and in 1833, Y.'s two-thirds to C. to secure 2106*l.*; and in 1838, the mortgages to A. and C. were assigned to D.: the case was treated as if the securities to B. and C. were charges upon different estates, and D., the assignee, was not allowed to retain the securities to A. and C. as against B.,

(b) *Titley v. Davies*, *supra*. See marg. note from Sergt. Hill's MS.

(c) *Id.*

(d) And see *Beevor v. Luck*, L. R. 4 Eq. 537.

until payment by the latter of all that was due on those securities. The decree (e), therefore, was for redemption by B., the second mortgagee of one-third, of all that was due on the security of 1821, which affected the whole estate, and, in default, foreclosure. Then for an account of subsequent interest due to D. in respect of the mortgage to C. of the two-thirds (1833), with a direction to distinguish the amount due on the mortgage of 1821, and to divide the same into three parts; and for redemption on payment by X. of one-third of the amount due on the last-mentioned mortgage, and by Y. of the other two-thirds thereof, and also of the sum due on the mortgage to C. of 1833; in default of payment, X. and Y. being severally foreclosed. In case of redemption by B., an account was directed of the amount due on his security (1831), and subsequent interest on what he should pay D.; and redemption by D., on payment of all found due to B., and in default foreclosure. Paragraphs
1219—1220

Provision was then made for redemption by X. and Y. respectively, and in default for foreclosure of them respectively, in similar terms *mutatis mutandis*, having regard to their respective shares. In case D. should redeem B., an account of the sum due to D. in respect of C.'s security (1833), and subsequent interest on what he should pay B.; and redemption directed by X. and Y., and, in default, foreclosure of them respectively, in similar terms *mutatis mutandis*, having regard to their respective shares in the mortgaged premises.

In this case B., by virtue of the rule, that a mortgagee ought not to be redeemed in part (1655), was called upon to redeem the whole security of 1821, which affected all the estate; but as to the right of redemption given to X. and Y., it was different, because their rights arose out of mortgages of distinct shares of the estate, effected after the splitting of the equity of redemption.

1220. The mortgages must originally have been made by the same mortgagor (f). Thus there can be no consolidation of a security given by a person for his own debt, with one given by him and another for their joint debt (g). And a mortgage by three cannot be consolidated with a prior mortgage by two of the same persons, though the equity of redemption belonged to all the three (g). For the mortgagee has no right to go behind the mortgagor and inquire into equitable interests for the purpose of consolidation (h). Mortgages
must have
been made
by the same
mortgagor.

(e) *Thorneycroft v. Crockett*, 2 H. L. C. 239. See as to the case where one mortgage was to A. and the other to A. and B. as joint tenants, *supra* (1214).

(f) *Cummins v. Fletcher*, 14 Ch. D. 699; *Sharpe v. Rickards*, [1909] 1 Ch. 109; notwithstanding *Beevor v. Luck*, L. R. 4 Eq. 537; and see *Marcon v. Bloxam*, 11 Ex. 586.

(g) *Re Raggett, Exp. Williams*, 16 Ch. D. 117.

(h) *Sharp v. Rickards*, [1909] 1 Ch. 109.

Paragraphs
1220—1222

Nor is a mortgagee with several securities entitled to the discharge of both debts, against a person who happens to be engaged (*i*) with another in one mortgage only, though his co-mortgagor may have pledged another estate to the same mortgagee. As where the mortgagee of one estate takes a second mortgage thereon as further security for an advance to another person, whose estate is also mortgaged to secure the same debt (*k*). The estate of the latter is here only liable for the sum advanced to him; but the estate of the first mortgagor is liable for both debts. In like manner, if two join in mortgaging their several estates to the same mortgagee, to secure a sum advanced to them both, or to one of them only, and then one mortgages to the same mortgagee, for his own debt, property, part of which was included in the former mortgage (*l*), he who is not mixed up with the last security shall not have the *onus* of redeeming it. And so where different interests in the same estate are mortgaged, and one of the owners afterwards mortgages his interest alone, (as where a dowress and heir-at-law mortgaged the estate, which had descended subject to a mortgage, and then the heir mortgaged again); the dowress was held entitled to her dower (*m*), subject only to payment of the ancestor's mortgage, and of that in which she had herself joined, with the interest and so much of the costs of suit as related to those sums. In all which instances it will be observed, that, though the securities were all in one hand, the equities of redemption in the estates, or in different interests in the same estate, were vested in divers owners.

No consolidation where a charge is mortgaged, as against the persons entitled to the estate charged.

1221. Where a tenant for life had charged the estate (*n*) in exercise of a power reserved to him, and had mortgaged the charge with other property to a second mortgagee, it was held, that the remainderman might redeem the latter without paying off his whole debt; on the ground that the burthen of the whole redemption would in effect be an increase, by so much, of the charge, making the estate of no value to those in remainder. But it was intimated, that there was a distinction between the cases of the mortgagor and of the remainderman.

Legal estate not essential to consolidation.

1222. It is now settled, contrary to some former *dicta* (*o*), that a mere equitable interest in the securities will enable the mortgagee to hold them both, the right not being founded upon any principle connected with the legal estate. Where A. mortgaged a reversionary

(*i*) *Jones v. Smith*, 2 Ves. Jun. 372.

(*k*) *Aldworth v. Robinson*, 2 Beav. 287.

(*l*) *Higgins v. Frankis*, 15 L. J. Ch. 329; *Bowker v. Bull*, 1 Sim. (n.s.) 29.

(*m*) *Jones v. Griffith*, 2 Coll. C. C. 207.

(*n*) *Lord Kensington v. Bouverie*, 19 Beav. 39 (affirmed 7 H. L. C. 559).

(*o*) See *Jones v. Smith*, 2 Ves. Jun. 372; *White v. Hillacre*, 3 Y. & C. 597; *Grugeon v. Gerrard*, 4 Y. & C. 119.

interest in equitable personalty to B., and secondly to C. (who was also mortgagee under A. of freehold and leasehold estates), upon trust for sale, and payment of the residue to A., and then sold to D., who, before completing his purchase, paid off B.; and A. declared, that until execution of the assignment to D., he should stand in B.'s place and have the benefit of her security; it was held that C. might, nevertheless, foreclose against A. and D. (although the latter was entitled to the benefit of B.'s security), in default of payment of both his securities (*p*). Here all the interests in the personalty were of necessity equitable, but the rule was put into operation in favour of a *puisne*, and against a prior incumbrance on that fund who had also purchased the equity of redemption.

1223. The right of consolidation overrides the right of the surety (**1360**) for one of the debts, who discharges it, to have the full benefit of the security for that debt; unless there be a special contract that the surety's right shall have priority; or unless fraud or misrepresentation against the surety have affected the rights of the mortgagee (*q*). A contract in the surety's favour will not be inferred, from the mere fact that the suretyship extends only to one of the debts, and that he refused to be bound for the other.

1224. The incumbrancer may consolidate securities of different natures, *e.g.*, an assignment of equitable personalty with a mortgage upon freeholds and leaseholds (*r*). But the surplus produce of a sale of chattels included in a bill of sale, cannot be held by the grantee of the bill of sale against an execution creditor, on the ground that the former holds a mortgage of other property from the same grantor; the claim being considered to be inconsistent with the definition of a bill of sale, and the provisions as to setting forth the consideration and other matters in the bills of Sale Act, 1878 (*s*) (**90**).

1225. The mortgagor cannot insist upon consolidation as against the *puisne* mortgagee of several estates, of which there are prior mortgages to different persons. Either of such persons may be redeemed separately by the *puisne* mortgagee, notwithstanding

(*p*) *Watts v. Symes*, 16 Sim. 640 and 1 De G. M. & G. 240; *Neve v. Pennell*, 2 H. & M. 170; *per* Sir W. P. Wood; and see *Exp. Berridge*, 3 Mont. D. & De G. 464, where the rule was applied in bankruptcy by directing an account of what was due upon all the securities.

(*q*) *Farebrother v. Wodehouse*, 23 Beav. 18; appeal compromised, 26 L. J. Ch. 240. *Conf. Nicholas v. Ridley*, 89 L. T. 234, and on appeal [1904] 1 Ch. 192.

(*r*) *Watts v. Symes*, 16 Sim. 640 and 1 De G. M. & G. 240; and see *Spalding v. Thompson*, 26 Beav. 637; *Tassell v. Smith*, 2 De G. & J. 713. So in *Jones v. Smith*, 2 Ves. Jun. 372, which was reversed by the House of Lords; but the reasons do not appear, and there seems no doubt on the point.

(*s*) *Chesworth v. Hunt*, 5 C. P. D. 266.

Paragraph
1225
puisne
mortgagees.

the mortgagor's objection (*t*). There is no question here of leaving either of the prior mortgagees a part of his security which may be deficient, not does it concern either of them, whether the other be redeemed or not. And if the *puisne* mortgagee seek to redeem those prior to him in one action (which he may do if they do not object) he may still have a decree to redeem them separately; for this mode of proceeding will not alter his rights as between him and the mortgagor, or prevent him from giving up his right to part of the security if he shall see fit, and working out his claim against the rest.

(*t*) *Pelly v. Wathen*, 7 Hare, 351 (affirmed 1 De G. M. & G. 16).

CANADIAN NOTES

CONSOLIDATION

THE law of consolidation does not arise immediately upon two different mortgages upon two different properties being made by the same person. It is only when these two mortgages are overdue, and the mortgagor seeks to redeem one of them without the other, or the mortgagee seeks to foreclose both as against the whole property that the consolidation takes place. In other words, the mortgagee has a right to elect, and upon his electing to do it, under proper circumstances, the mortgages are taken to be consolidated. The mortgagee cannot elect so as to burden the equity of redemption of any person who is not subject to have this equity burdened (*a*).

In *Dominion Savings and Investment Society of London v. Kittridge* (*b*). It was held that the rule of equity, which allows the holder of several mortgages created by the same mortgagor on separate properties to consolidate the debts and insist on being redeemed in respect of all before releasing any one of his securities, is not "tacking" and is not such a claim as the Registry Act declares shall not be allowed to prevail against the provisions thereof.

The right to consolidate can be asserted in a suit for redemption, and in a suit for foreclosure (*c*).

Nor can the right be insisted on as a condition of granting the mortgagor relief in respect of a legal claim, for example, a claim to insurance moneys payable in respect of one of the mortgaged properties (*d*).

(*a*) *Stark v. Reid* (1895), 26 O. R. 257; *The Colonial Investment and Loan Co. v. King et al* (1902), 5 Territories L. R. 371.

(*b*) (1876), 23 Gr. 631.

(*c*) *Johnston v. Reid* (1881), 29 Gr. 293.

(*d*) *Re Union Assurance Co.* (1893), 23 O.R. 627.

This rule applies not only where the mortgages in respect of which consolidation is sought were originally made to one mortgagee, but also where they were originally made to several mortgagees and have afterwards come to the same hand by transfer (*e*). It may be enforced not only against the mortgagor but also, subject to the limitations to be noticed presently, against all persons claiming title under the mortgagor to all of the mortgaged properties, or to any one of them, or to a part of one or more of them (*f*).

If the owner of two properties mortgages both to A., and subsequently mortgages one of them to B. and gives a second mortgage on the other to A., the latter cannot consolidate so as to obtain priority for both his mortgages over B.'s mortgage (*g*). Where two or more mortgages originally held by different persons do not become united in title in one person until after the equity of redemption in one of them has been assigned, the person holding the mortgages is not entitled to consolidate as against the assignee of the equity of redemption (*h*).

In Ontario the Registry Act (*i*) does not deal in express terms with the right to consolidate. But the statute affects the doctrine indirectly; for a mortgagee may not consolidate as against subsequent mortgagees or purchasers of one of the mortgaged properties, unless they took with notice of the right to consolidate (*k*).

Where a purchaser of the mortgaged lands inquires of the mortgagee before purchasing the amount due on the mortgage and acquaints him of his intending purchase, the mortgagee will have no right as against such purchaser to consolidate his mortgage with another security on other lands; if he neglects to notify the purchaser of his right the registration of the mortgage on the other lands is not notice (*l*).

(*e*) *Silverthorn v. Glazebrook* (1899), 30 O.R. 408.

(*f*) *Hyman v. Roots* (1863), 10 Gr. 340.

(*g*) *Buckler v. Bowman* (1866), 12 Gr. 457.

(*h*) *Fraser v. Nagle* (1888), 16 O.R. 241.

(*i*) R. S. O. (1897), c. 136.

(*k*) *Brower v. Canada Permanent Building Association* (1877), 24 Gr. 509; *Johnston v. Reid* (1881), 29 Gr. 293; *Miller v. Brown* (1882), 3 O.R. 210; *Smith v. Smith* (1889), 18 O.R. 205.

(*l*) *Dominion Savings and Investment Society of London v. Kittridge* (1876), 23 Gr. 631; *Johnston v. Reid* (18 1), 29 Gr. 293.

A subsequent mortgagee who is entitled to consolidate may insist on his right when proving his claim in the Master's office. He may prove his claim on both mortgages and insist on being redeemed as to both (*m*).

(*m*) *Ross v. Stevenson* (1877), 7 P. R. 126; *Merritt v. Stephenson* (1858), 7 Gr. 22.

CHAPTER V.

Of Special Rules applying to Priority under Securities upon Chattels Personal and Choses in Action, and upon Ships under the Maritime Law.

PARAGRAPH

Section I.—Of Priority in Securities upon Chattels Personal and Choses in Action; and herein of the necessity of giving Notice of Mortgages to Trustees and Others	1226—1258
,, II.—Of Priority under the Maritime Law	1259—1265

SECTION I.

Priority in Securities upon Chattels Personal and Choses in Action; and herein of the Necessity of Giving Notice of Mortgages to Trustees and Others.

<i>General rule as to getting possession or giving notice of mortgage in case of personal chattels and choses in action</i>	1226
<i>Principles on which rule founded</i>	1227
<i>A puisné incumbrancer without notice may gain priority by taking possession or by giving a first notice</i>	1228
<i>No distinction between legal and equitable incumbrancer as to giving notice</i>	1229
<i>Effect of accidental notice obtained by trustee</i>	1230
<i>Rule does not apply to negotiable instruments or equitable interests in land</i>	1231
<i>Rule applies to equitable interests in proceeds of sale of land</i>	1232
<i>How far necessary to notify assignment of mortgage to mortgagor</i>	1233
<i>Mortgagees of policies must notify the office</i>	1234
<i>To whom notices should be given</i>	1235
<i>In absence of trustees, mortgagee of shares or stock should notify the company</i>	1236
<i>Duty of party giving notice to see that it reaches its destination</i>	1237
<i>Notices in mortgages of shares or stock</i>	1238
<i>Notice to partners</i>	1239
<i>Notice to trustees</i>	1240
<i>Time at which notice takes effect</i>	1241
<i>Notice to paymaster-general of security on fund in court useless</i>	1242
<i>Incumbrancer on funds in court should obtain stop order</i>	1243
<i>Trustee paying money into court who claims a lien on it must get a stop order</i>	1244
<i>Priority between contemporaneous stop orders</i>	1245
<i>Notice with regard to fund in court where court has not dealt with it</i>	1246
<i>Person notified is bound to accept the notice</i>	1247
<i>Notice of equitable mortgages of ships</i>	1248

Paragraph
1226

PARAGRAPH

<i>Notice to femes covertes and infants</i>	1249
<i>Notices only effectual when fund is in the hands of person notified</i> ..	1250
<i>Omission to give notice immaterial if it could not reasonably be given</i> ..	1251
<i>Rule as to giving notice binding on bankruptcy trustees, except under order and disposition clause</i>	1252
<i>Order and disposition clause inapplicable where mortgagor's fraud prevented completion of mortgagee's title</i>	1253
<i>Legal title to personally gives same priority as in case of land</i>	1254
<i>Declaration of trust of choses in action requires no notice to be given to debtor, etc.</i>	1255
<i>Right of mortgagee of ship to freight if he takes possession</i>	1256
<i>Rule as to possession of chattels does not defeat a registered bill of sale</i> ..	1257
<i>Where two conflicting mortgagees of personally are equally diligent they take in order of date</i>	1258

General rule as to getting possession or giving notice of mortgage in case of personal chattels and choses in action.

1226. The validity or the priority of a security on personal property (other than leaseholds) (**1231—2**), often depends upon the giving or withholding, by the owner of it, of certain notices. An assignee (whether by way of mortgage or otherwise), of personal chattels, must, if he can, complete his title by possession (**63**). But if possession cannot be had (as in the case of a chattel, the legal right to which is not in the assignor, or which, from other circumstances, cannot be delivered), or, as in the case of a bond debt, or other chose in action (*a*), is incapable of delivery, the assignee must give notice to all who have a legal control over the disposition of the property; by which means he places them under the obligation of treating it as his, and protects future lenders who make due inquiry, against prior incumbrances (*b*) (**1236**). Before lending on such securities, a proposed mortgagee is bound to inquire if any such notices have been already given (*c*). The person interrogated is not bound to answer (*d*). If he declines to do so the proposed lender proceeds at his peril (*b*). If, however, he does answer, he must answer truly, or will otherwise be liable to indemnify the proposed lender (*e*), unless the answer has been obtained by concealment of a material fact by the inquiring party, *e.g.*, that he had already applied to the trustees' solicitors who were considering what advice they should give (*f*). If a prior mortgagee has omitted to give notice, then the mortgagor (*g*), who remains the apparent owner, or his legal personal

(*a*) The law as to the priority of mortgagees of a debt or other chose in action must be determined by the domicile of the *debtor*, and not by that of either mortgagor or mortgagee: *Re Queensland Mercantile, etc., Co., Exp. Australasian Investment Co.*, [1891] 1 Ch. 536, affirmed [1892] 1 Ch. 219.

(*b*) *Dearle v. Hall*, 3 Russ 1, and *Loveridge v. Cooper*, 3 Russ. 30; *Foster v. Cockerell*, 9 Bligh (n.s.) 332; *Exp. Monro*, Buck, 300; *Jones v. Jones*, 8 Sim. 633; *Williams v. Thorp*, 2 Sim. 257; *Meux v. Bell*, 1 Hare, 73; *Exp. Colville*, Mont. 110; *Exp. Tennyson*, Mont. & Bl. 67.

(*c*) *Smith v. Smith*, 2 Cr. & M. 231.

(*d*) *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188.

(*e*) *Low v. Bouverie*, [1891] 3 Ch. 82.

(*f*) *Porter v. Moore*, [1904] 2 Ch. 367.

(*g*) *Stocks v. Dobson*, 5 De G. & Sm. 760.

representative (*h*), can release, receive, or re-assign the debt or other property; and in case of his bankruptcy it will, (unless it be a chose in action other than a debt due, or growing due, to him in the course of his business,) belong to his creditors as property within the order and disposition clause of the Bankruptcy Act (*i*) (124). The mere delivery of the evidence of the debt (*ex.gr.*, an I.O.U.) is not sufficient, because it will not prevent the mortgagor from claiming the debt from the person liable to pay it (*k*). As between mortgagor and mortgagee, however, the security is complete without notice (*l*).

1227. The principle on which this rule is founded is therefore this, that a person who gives notice has a better equitable right than a prior incumbrancer who has given no notice. Any other view would facilitate fraud and cause loss to those who might have used every precaution before parting with their money (*m*). For this reason the rule does not give to the trustee in bankruptcy of the assignor priority over a prior assignee who has omitted to give notice. For the trustee in bankruptcy being merely a statutory assign cannot have been deceived by the absence of the notice (*n*).

Paragraphs
1226—1228

Principal on
which rule
founded.

1228. It follows from this principle, that if a *bonâ fide* incumbrancer upon personal chattels without notice of a prior charge thereon obtains possession (*o*), or, (where the security is upon a chose in action), gives notice of his own charge to the person who has the legal interest in, or the control over the property, he shall generally be preferred (whether he claims under the mortgagor himself or under his personal representative (*p*)), to an earlier claimant who has not taken possession, or who has given later or no notice (*q*), unless the holder of the property, by other means,

A *puisne*
incumbrancer
without
notice may
gain priority
by taking
possession,
or by giving
a first notice.

(*h*) *Re Freshfield's Trust*, 11 Ch. D. 198.

(*i*) Bankruptcy Act, 1883, s. 44 (iii.), Act of 1869, s. 15 (5). The debentures of a company charging the undertaking (*Re Pryce, Exp. Rensburg*, 4 Ch. D. 685), a policy of life assurance (*Exp. Ibbetson, Re Moore*, 8 Ch. D. 519), are *chooses in action* within the exception in the Act of 1869, and equitable interests in shares in a company. (*Exp. Barry*, L. R. 17 Eq. 113). But not such shares when belonging to a registered owner. (*Exp. Union Bank of Manchester, Re Jackson*, L. R. 12 Eq. 354. See *Exp. Nutting*, 2 Mont. D. & De G. 302; *Exp. Vallance, Re Lashman*, 3 Mont. & A. 224; *Green v. Ingham*, L. R. 2 C. P. 525.) But where, by a deposit, it is only intended to create a lien, and not an equitable assignment, it was held that the assignees of the depositor could not maintain an action at law to recover possession, though no notice have been given (*Gibson v. Overbury*, 7 Mee & W. 555; *Broadbent v. Varley*, 12 C. B. (N.S.) 214).

(*k*) *Williams v. Thorp*, 2 Sim. 257; *Exp. Colville*, 2 Sim. 570, n.

(*l*) *Gorringe v. Irwell India Rubber, etc., Works*, 34 Ch. D. 128; *Ward v. Duncombe*, [1893] A. C. 369, 392.

(*m*) See *per* Lord HERSCHELL, *Ward v. Duncombe*, [1893] A. C. 369.

(*n*) *Re Wallis, Exp. Jenks*, [1902] 1 K. B. 719.

(*o*) *Daniel v. Russell*, 14 Ves. 392.

(*p*) *Re Freshfield's Trust*, 11 Ch. D. 198; *Montefiore v. Guedalla*, [1903] 2 Ch. 26.

(*q*) *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, 3 Russ. 30; *Foster v. Blackstone*, 1 Myl. & K. 297, affirmed 3 Cl. and F. 456; *Foster v. Cockerell*, 9 Bli. (N.S.) 332; *Meuz v. Bell*, 1 Hare, 73; *Lee v. Howlett*, 2 K. & J. 531; *Ward v. Duncombe*, [1893] A. C. 369, where the reasons for the doctrine were discussed and explained, and see also *Stephens v. Green*, [1895] 2 Ch. 148; *Re Lake, Exp. Cavenish*, [1903] 1 K. B. 151; and *Re Dallas*, [1904] 2 Ch. 385.

Paragraphs 1228—1231 has, or if he had made proper inquiry would have, acquired sufficient notice of the earlier claim (*r*).

No distinction between legal and equitable incumbrancers as to giving notice.

Effect of accidental notice obtained by trustee.

Rule does not apply to negotiable instruments or equitable interests in land.

1229. There is no distinction in this matter between legal and equitable incumbrancers; an equitable sub-mortgagee by deposit being as much bound to give notice as an original mortgagee by assignment (*s*). The assignee may, however, at any time complete his title by giving notice subject to assignments of which earlier notice had been given (*t*). And the burthen of showing the absence of notice is upon those who claim against the security (*u*).

1230. Formal notice to a trustee or other person to whom notice ought to be given, does not give priority over an earlier incumbrance of which he may have obtained accidental notice (*x*); but the converse proposition that the incumbrances are to rank not in the order of notices given by them, but of accidental knowledge obtained by the trustee, does not hold good (*y*).

1231. The rule that notice must be given, does not apply where the security consists of a bill of exchange, promissory note payable to order, or other negotiable instrument (*z*), whether indorsed or not by the debtor (*a*); nor (by analogy to legal interests in land) to assignments of equitable interests in land or chattels real (*b*) **1190**. For, as at law, conveyances of different interests carved out of the freehold take effect according to priority in time, (the latter not operating till the earlier have ceased), so equity, following the law, treats conveyances of the equity of redemption as interests taken out of the fee are treated at law (*c*), and the mortgagee will not be postponed because he has not given notice. Notice is therefore unnecessary of equitable submortgages of real estate (*d*), of assignments in equity of incomes payable out of real estate as part of the inheritance (*e*), or of reversionary interests in real estates not directed to be sold (although the parties entitled have, as between themselves, treated their interests as personalty) (*f*); as also of assignments

(*r*) *Lloyd v. Banks*, L. R. 3 Ch. 488; *Spencer v. Clarke*, 9 Ch. D. 137.

(*s*) *Exp. Arkwright*, 3 Mont. D. & De G. 129; *Exp. Wood*, 3 Mont. D. & De G. 315.

(*t*) *Re Seaman, Exp. Furness Finance Co.*, [1896] 1 Q. B. 412.

(*u*) *Exp. Stevens*, 4 Deac. & C. 117. (*x*) *Lloyd v. Banks*, L. R. 3 Ch. 488.

(*y*) *Arden v. Arden*, 29 Ch. D. 702.

(*z*) As to what instruments are "negotiable" see *London Joint Stock Bank v. Simmons*, [1892] A. C. 201.

(*a*) *Exp. Price*, 3 Mont. D. & De G. 586. The incumbrancer may have an equity to have the security endorsed by the debtor or his assignees. (Id.; and *Exp. Greening*, 13 Ves. 206; *Exp. Mowbray*, 1 Jac. & W. 428), but the debtor may ignore a notice given by the assignee of the consideration for the note or bill if the assignor is still the holder of the instrument itself. *Bence v. Shearman*, [1898] 2 Ch. 582.

(*b*) *Wilnot v. Pike*, 5 Hare, 14; *Jones v. Jones*, 8 Sim. 633; *Wiltshire v. Rabbits*, 14 Sim. 76; *Rooper v. Harrison*, 2 K. & J. 86; *Re Richards, Humber v. Richards*, 45 Ch. D. 589; *Hopkins v. Hemsworth*, [1898] 2 Ch. 347; and see *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231.

(*c*) *Jones v. Jones*, 8 Sim. 633; *Taylor v. London and County Banking Co.*, *supra*.

(*d*) *Hopkins v. Hemsworth*, [1898] 2 Ch. 347; and see also *Re Richards, Humber v. Richards*, 45 Ch. D. 589.

(*e*) *Rochar d v. Fulton*, 1 Jo. & Lat. 413.

(*f*) *Lee v. Howlett*, 2 Kay & J. 531.

of leaseholds (*g*), and annuities charged thereon (*h*). It is the same if the mortgage be in the form of a trust for sale (*i*). Paragraphs
1231—1233

1232. But where the mortgage affects an interest in the proceeds of real estate devised upon trust for sale, or directed to be sold, or a portion to be raised out of real estate, and which can only be received as money, and is not a right to the land itself, notice must be given (*k*). Rule applies to equitable interests in proceeds of sale of land.

Where a security was given upon a share of property then unconverted (though an administration suit, of which the *puisne* incumbrancer had notice, was pending), it was held (*l*), that he could not, after a sale under the decree in the suit, obtain priority by means of a judge's order charging the produce of the sale in court, even supposing that, as a judgment creditor, he was entitled to the same rights as the purchaser by particular contract for value; which was doubted (*m*).

Where, however, the situation of the property was such, that, though not actually converted at the date of the security, it was considered as being converted, under certain trusts to which it was subject, and, after actual conversion, a *puisne* incumbrancer gave notice to the trustees who held the purchase-moneys, he was held (*n*) to have gained priority over others earlier in time (*o*).

1233. It is not necessary in order to complete the title of an assignee of a mortgage, or of a sub-mortgage, either of land or How far necessary to notify

(*g*) *Jones v. Jones*, 8 Sim. 633; *Taylor v. London and County Banking Co.*, *supra*, and *Union Bank of London v. Kent*, 39 Ch. D. 238.

(*h*) *Wiltshire v. Rabbits*, 14 Sim. 76.

(*i*) *Wilmot v. Pike*, 5 Hare, 14.

(*k*) *Lee v. Howlett*, 2 K. & J. 531; *Consolidated Investment, etc., Co. v. Riley*, 1 Giff. 371; *Re Hughes*, 2 H. & M. 89; *Lloyd's Bank v. Pearson*, [1901] 1 Ch. 865. How far this is consistent with *Kirkland v. Peatfield*, [1903] 1 K. B. 756, where such an interest was held to be a sum charged upon or payable out of land within the Real Property Limitation Acts seems open to argument. The deposit of a land order of the New Zealand Company has been held to require no notice to the company. (*Exp. Barnett*, De G. 194). But shares in a canal company, possessing land for the purposes of trade, are not considered to be real estate (*Exp. Richardson*, 3 Deac. 496).

(*l*) *Brearclyff v. Dorrington*, 4 De G. & Sm. 122; and see *Dunster v. Lord Glengall*, 3 Ir. Ch. 47.

(*m*) But see *Exp. Boyle, Re Boyle*, 17 Jur. 979.

(*n*) *Foster v. Blackstone*, 1 Myl. & K. 297 (affirmed 3 Cl. & F. 456).

(*o*) The rules concerning conversion require a clear indication of an intention to change the nature of the property; a mere trust to sell in a certain event (in the case of conversion of realty) being insufficient. And if there be a sale under a power or a conditional trust for sale in a mortgage, and no more express indication of intention, as to the destination of the surplus moneys, than a direction to pay them to the executors or administrators, or the heirs, executors or administrators of the mortgagor, they will be held to belong to the heir, upon whom the equity of redemption has descended, if the sale be made after the mortgagor's death; otherwise to the executors or administrators of the mortgagor (*Bourne v. Bourne*, 2 Hare, 35; *Biggs v. Andrews*, 5 Sim. 424; *Wright v. Rose*, 2 Sim. & St. 323). But under an absolute trust for sale in a deed, the produce will remain personalty, though not sold till after the death of the grantor, if the words of the deed be sufficient to change the nature of the property (*Griffith v. Ricketts*, 7 Hare, 299; and see *Shadforth v. Temple*, 10 Sim. 184; *Re Cooper*, 17 Jur. 1087; *Fan v. Barnett*, 19 Ves. 102; *Griesbach v. Fremantle*, 17 Beav. 314; *Leigh and Dalz. on Conversion*, Ch. 5, 6).

Paragraphs
1233—1234

assignment of
mortgage to
mortgagor.

Mortgagees
of policies
must notify
the office.

personal estate, to give notice to the original mortgagor of the assignment of the mortgage debt; because the debt is incident to the property which forms the security, and which cannot be taken from the assignee without payment (*p*). But so long as the original mortgagor has no notice of the assignment, his payments on account of the debt to his original mortgagee, will discharge him (*q*).

1234. By the policies of Assurance Act, 1867 (s. 3), no assignment made after the passing of the Act (August 20th, 1867) of a policy of life assurance, shall confer on the assignee, his executors, administrators, or assigns, *any right to sue for the amount* of such policy or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy, at their principal place, or one of their principal places of business in England, Scotland, or Ireland, and the date on which such notice shall be received, *shall regulate the priority* of all claims under any assignment (*r*); and a payment *bona fide* made in respect of any policy by any insurance company before the date on which notice shall have been received, shall be as valid against the assignee giving such notice as if the Act had not been passed (**1284**).

By s. 4, every assurance company shall, on every policy issued by them after September 30th, 1867, specify their principal place or places of business at which notices of assignment may be given, in pursuance of the Act.

By s. 6, every assurance company shall, upon the request in writing by any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment of a fee not exceeding 5s., deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company, of their receipt of such notice; and every such acknowledgment, if signed by a person being *de jure* or *de facto*, one of those officers whose acknowledgment it purports to be, shall be conclusive evidence as against the company of the receipt of the notice.

An instrument of deposit, not operating as an assignment of a policy, will not be construed as an assignment as against the insurance company, by reason of their accepting notice of it, and giving a receipt for such notice in the terms of the Act. And on the death of the assured, the company may, in such a case, refuse payment of the policy until the consent of the legal personal representative of the assured has been obtained (*s*). The court can

(*p*) *Jones v. Gibbons*, 9 Ves. 407; *Exp. Mackay, Re Wright*, 1 Mont. D. & De G. 550; see *Exp. Taylor*, Mont. 240; *Exp. Barnett*, De G. 194.

(*q*) *Re Lord Southampton's Estate*, *Allen v. Lord Southampton*, 16 Ch. D. 178.

(*r*) See *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700.

(*s*) *Crossley v. City of Glasgow Life Assurance Co.*, 4 Ch. D. 421; *Webster v. British Empire Mutual Life Assurance Co.*, 15 Ch. D. 169.

dispense with the presence of the latter under R. S. C. Order XVI., r. 46, and has done so where the debt exceeded the money due on the policy, the mortgagor's estate being insolvent, and there being no persons able or willing to administer (*t*). Paragraphs
1234—1235

A mere agreement to execute a mortgage of a policy is not an assignment within the Act (*u*). And the benefit of a possessory lien on a policy is not lost for want of notice of it to the assurance company (*x*).

1235. In considering to whom notice should be given, the question will be (*y*) whether, at the time of lending the money, every person of whom the incumbrancer ought to inquire (and unless he apply to all who have control over the fund, he will not exercise proper caution (*z*)) has sufficient notice. If the circumstances be such, that inquiry would not have led to a knowledge of the prior incumbrance, the notice will not be sufficient. It is not, however, meant by this Act that if the person inquired of, declines to answer (which he is entitled to do (*a*)), that notice to him is not sufficient to gain priority over subsequent incumbrancers. The possession of the legal interest, in or control over the property which is the subject of the security, points out the person to whom the notice should be given. The debtor, therefore, where the subject of an assignment is a debt (*b*); the trustee where it is due from a bankrupt; the official liquidator where it is due from a company in course of winding up; the insurers where the subject is a policy of insurance; the executor where it is a legacy, and if it be given in trust, then, after the executor has assented to it, the trustees, are the proper recipients of notice (*c*). And if there be more than one set of trustees, notice to the trustee whose duty it is to pay the fund to the mortgagor (*d*) will prevail (**522**). If one of the trustees be himself an executor, notice to the others before his assent will be inoperative (*e*) against a notice to him by a subsequent incumbrancer, though, where it is fully vested, in all the trustees, notice to one is sufficient (*f*), as long as he remains a

To whom
notices should
be given.

(*t*) *Crossley v. City of Glasgow Life Assurance Co.*, *supra*; *Curtius v. Caledonian Fire and Life Insurance Co.*, 19 Ch. D. 534; notwithstanding *Webster v. British Empire Mutual Life Assurance Co.*, *supra*.

(*u*) *Spencer v. Clarke*, 9 Ch. D. 137.

(*x*) *West of England Bank v. Batchelor*, 51 L. J. Ch. 199.

(*y*) *Smith v. Smith*, 2 Cr. & M. 231; *Meux v. Bell*, 1 Hare, 73; *Timson v. Ramsbottom*, 2 Keen, 25.

(*z*) *Smith v. Smith*, *supra*.

(*a*) *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188; *Low v. Bouverie*, [1891] 3 Ch. 82.

(*b*) *Re Seaman, Exp. Furness Finance Co.*, [1896] 1 Q. B. 412.

(*c*) *Gardner v. Lacklan*, 4 Myl. & Cr. 129; *West v. Reid*, 2 Hare, 249; *Holt v. Dewell*, 4 Hare, 446; *Exp. McTurk*, 2 Deac. 58; *Re Breech-Loading Armoury Co.*, L. R. 5 Eq. 284.

(*d*) *Stephens v. Green*, [1895] 2 Ch. 148.

(*e*) *Holt v. Dewell*, *supra*.

(*f*) *Meux v. Bell*, 1 Hare, 73; *Ward v. Duncombe*, [1893] A. C. 369; *Timson v. Ramsbottom*, 2 Keen, 35; *Re Hall, Nolan v. O'Brien*, 7 L. R. Ir. 180; *Re Wasdale, Brittin v. Partridge*, [1899] 1 Ch. at p. 165.

Paragraphs trustee, but not afterwards, but *secus* where the mortgagor himself
 1235—1236 is the only trustee who has notice: as to which see *infra* (1236).

In a like manner, notice by the assignee of the freight of a ship to the owner's agent, who entered alone into the charter-party as agent, has been held sufficient, without notice to the charterers (*g*); the agent being the only person with whom the contract was made, and to whom the money was payable. And where the ship, which, together with the expected produce of the voyage, formed the subject of the assignment, was at sea, notice was held to have been properly and sufficiently sent to the master (*h*). A mortgagee is, however, not bound to send notice to the master of a ship and cargo at sea (*i*), notice to the consignees and shipowner being sufficient to preserve his priority if done with due diligence; though he might, perhaps, be overreached, if notice were given to the master while at sea by a later incumbrancer. (But see 1251.)

In absence of trustees, mortgagee of shares or stock should notify the company.

1236. In the absence of any person having control over a fund consisting of stock, and to whom notice would ordinarily be given,—as if the sole trustee be dead, and there be no legal personal representative,—the incumbrancer should serve upon the Bank of England or other public company by which the transfers of the security are effected, notice of his interest (*k*) in lieu of the *distringas* which was formerly placed upon it (*l*), and by so doing will gain priority over one who has neglected to take the same precaution (*m*). But if there be no person having the legal control of the fund (as for instance where it is a trust fund the investing of which one not known and the last surviving trustee has died intestate, so that pending the grant of letters of administration there is no one to whom notice can be given) then incumbrances rank in the order in which notices are given to the person who subsequently has the legal dominion (*n*). An *ordinary* notice to a company registered under the Companies Act, 1862 (now the Companies Consolidation Act, 1908), of equitable rights is, it would seem, not sufficient (*o*). Or, if the fund be in the hands of a trustee who being himself a creditor upon it, cannot complete his title by personal notice, he should take care that it appears on the declaration of trust or other equivalent instrument (*p*). It was decided in one case (*q*) that it

(*g*) *Gardner v. Lachlan*, 4 Myl. & Cr. 129. (*h*) *Langton v. Horton*, 1 Hare, 549.

(*i*) *Feltham v. Clark*, 1 De G. & Sm. 307; see *Exp. Kelsall*, De G. 352; *Kemp v. Falk*, 7 App. Cas. 573, per Lord BLACKBURN.

(*k*) Rules, 1883, Order XLVI. 2—11.

(*l*) See R. S. C., Order XLVI.

(*m*) *Etty v. Bridges*, 2 Y. & Coll. C. C. 486.

(*n*) *Re Dallas*, [1904] 2 Ch. 385.

(*o*) See per Lord SELBOURNE in *Société Generale de Paris v. Walker*, 11 App. Cas. 20, and particularly judgments in *C. A. 14 Q. B. D. 424*; *sub. nom. Société Generale de Paris v. Tramways Union Co.*, but cf. *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

(*p*) *Commissioners of Public Works v. Harby*, 23 Beav. 508.

(*q*) *Phipps v. Lovegrove*, L. R. 16 Eq. 80.

was only by means of such a notice on the deed, or of transfer of the fund into court, that the incumbrancer of an equitable interest could be safe, on the ground that on an appointment of new trustees the notice might fail by non-communication. But it has since been held that a change of trustees does not alter a priority once gained by notice to *all* the trustees in existence when the notice was given, although it would be otherwise when the notice was not given at all (*r*). Notice given by an assignee of a fund to a person who is himself the assignor is not an effectual notice so as to alter priorities (*q*); and it would seem that notice to an executor who renounces is invalid (*q*). In such cases it is the same as if there was (when the notice was given) no person in existence to whom effective notice could be given, and therefore the priorities are determined by the dates of notices given to persons who subsequently acquire the legal dominion (*q*). Paragraphs
1236—1238

1237. It is the duty of the giver of the notice to take care that it reaches the person who has the control of the property to be affected by it. And notice ought not to be given only to an agent, who as assignor has an interest in withholding communication of it; nor *à fortiori* ought a mortgagee to trust that the principal will have constructive notice through the agent as assignor. Thus the knowledge that the secretary or agent of a public company has as mortgagor, in his private capacity, of dealings with shares in or insurances granted by the company, will not create notice to the company of such dealings (**1069**), especially where, in the case of a policy effected by an agent for the purpose of security, there is nothing on the face of the policy to show that he effected it in that character (*s*). But it will be otherwise as to a policy effected through the attorney of the assignee, who is also the agent of the insurance company, where the company has authorized him to receive notices, and has agreed that they shall be as valid as if served on the company at their office (*t*). Duty of party
giving notice
to see that it
reaches its
destination.

1238. Where the security consists of shares in a public company or undertaking, if the security be made by the directors and secretary for the purposes of the company, no further notice will be necessary (*u*). If the mortgage be made by a shareholder to a third party, companies (such as banking companies) governed by the Companies Clauses Consolidation Act, 1845 (*v*) are not bound to recognize equities at all, and therefore it is apprehended such companies are not bound to see that the security is discharged Notices in
mortgages of
shares or
stock.

(*q*) *Phipps v. Lovegrove*, L. R. 16 Eq. 80.

(*r*) *Re Wasdale, Brittin v. Partridge*, [1899] 1 Ch. 163.

(*s*) *Re Hennessy*, 2 Dru. & War. 555; *Exp. Boulton*, 1 De G. & J. 163; and see *Bartlett v. Bartlett*, 1 De G. & J. 127.

(*t*) *Gale v. Lewis*, 9 Q. B. 730.

(*u*) *Exp. Stewart, Re Shelley*, 11 Jur. (N.S.) 25.

(*v*) 8 & 9 Vict. c. 16, s. 20.

Paragraphs
1238—1239

before accepting a transfer ; and the same remark is equally applicable to companies registered under the old Act of 1862 or the Companies Consolidation Act, 1908 (*w*). But this does not apply to subsequent liens or securities claimed by the company itself which will be postponed to mortgages of which they have received notice (*x*). Where notice is otherwise effective, notice given to the secretary, official liquidator or other officer who represents the company will bind it (*y*), and the assignee will not be affected by the neglect of the recipient of the notice to make a proper entry (*z*) ; although a subsequent assignee, who is damnified by the neglect, may have a remedy against the company. It would seem, however, that the possession by the mortgagee of the share certificates is sufficient to take the shares out of the mortgagor's order and disposition, both for the purposes of the bankruptcy law, and probably as against subsequent incumbrancers (*a*). Notice to the director of a company is not sufficient ; for though it was held, where a director, being also the assignor and an auditor of a company, had notice of the assignment, that no formal notice to the company was necessary (*b*), it has been observed, that such a doctrine might compel a creditor to go half round the kingdom to discover whether notice had been given. And neither an auditor (*c*), director (*d*), or actuary (*e*), are now considered proper recipients of notice to bind the company with which they are connected. Notice to the solicitor of trustees was formerly held to bind them (*f*). But this has lately been denied unless the solicitor is expressly or impliedly authorized as agent to receive such a notice (*g*). It seems, therefore, that unless express authority be shown, it cannot be assumed that notice to a solicitor will bind his clients.

Notice to
partners.

1239. Notice to one of several partners is notice to the partnership (*h*) ; but in the case of mutual assurance companies, wherein every insurer becomes a partner, his dealing with his own policy will not be considered as a partnership act, affecting the society (*i*) with notice.

(*w*) 8 & 9 Vict. c. 16, s. 20.

(*x*) 8 Ed. 7, c. 69, s. 27, re-enacting s. 30 of the Companies Act, 1862, and see *per* Lord SELBOURNE, *Société Generale de Paris v. Walker*, 11 App. Cas. 20, and judgment of the Court of Appeal in the same case, 14 Q. B. D. 424, *sub nom. Société Generale de Paris v. Tramways Union Co.*

(*y*) *Re Hennessy*, 2 Dru. & War. 555 ; *Re Breech-Loading Armoury Co.*, L. R. 5 Eq. 284 ; *Alletson v. Chichester*, L. R. 10 C. P. 319 ; and see *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

(*z*) *North British Insurance Co. v. Hallett*, 7 Jur. (N.S.) 1263.

(*a*) *Colonial Bank v. Whinney*, 11 App. Cas. 426.

(*b*) *Exp. Waithman*, 4 Deac. & C. 412.

(*c*) *Re Hennessy*, *supra*.

(*d*) *Exp. Burbridge*, 1 Deac. 142.

(*e*) *Id.* ; *Exp. Watkins*, 2 Mont. & Ayr. 348.

(*f*) *Rickards v. Gledstones*, 8 Jur. (N.S.) 455 (affirmed 31 L. J. Ch. 142).

(*g*) *Saffron Walden, etc., Building Society v. Rayner*, 14 Ch. D. 406.

(*h*) *Travis v. Milne*, 9 Hare, 141 ; *app. Benningfield v. Baxter*, 12 App. Cas. 167 ; *Re Worcester Corn Exchange Co.*, 3 De G. M. & G. 180 ; and cases in next note.

(*i*) *Thompson v. Speirs*, 13 Sim. 469 ; *Re Bromley, Exp. Wilkinson*, 13 Sim. 475 ;

1240. Notice to the trustee binds the *cestui que trust* (*k*). If there be several trustees, notice to one of them is generally sufficient, so long as he lives, and the circumstances remain unaltered (*l*). And, if he dies, without having communicated the notice to his co-trustees, his death has no effect on the priorities of securities made during his lifetime (*m*), although it will on the priorities of new securities made after his death; the giving of a new notice being then imperative so as to preserve the priority of an old mortgagee against such new incumbrancers (*n*). New trustees are not responsible for erroneous statements as to notices unless they knew of them, or unless such notices were with the trust documents (*o*). It is not material in what character the trustee acquired notice, because it is the duty of the mortgagee to apply for information to every trustee. And the mere participation by the trustee in the transaction will work sufficient notice, if the trustee fill the character of assignee; because it is against his interest to conceal it; and moreover his legal estate will give him priority (*p*). Where, being the assignor, it is his interest to withhold his knowledge, notice does not arise merely from his participation in the transaction (*q*); but if a formal notice be given to him and his co-trustees as such, it will be good, notwithstanding his interest in concealing it (*r*). But this is not so where he is sole trustee (*s*) (**1236**). Where there were two sets of trustees, one of an annuity, and the other of a term by which the annuity was secured, notice of a prior incumbrance to one of the trustees of the annuity was held binding (*t*), although the trustees of the term had no notice. But in the case of subsidiary settlements, the notice should be given to the trustees of the latter, whose duty it is to hold the fund for the mortgagor (*u*). For instance, where there is a settlement of a reversionary legacy, the mortgagee of a person entitled under the settlement should give notice to the trustees thereof, and such notice will prevail over a notice given to the executors or trustees of the will, and even over a stop order obtained in an action for administering the trusts of the will (*u*).

Paragraph
1240

Notice to
trustees.

Exp. Arkwright, 3 Mont. D. & De G. 129; notwithstanding *Duncan v. Chamberlayne*, 11 Sim. 123, and *Exp. Rose*, 2 Mont. D. & De G. 131.

(*k*) *Wise v. Wise*, 2 Jo. & Lat. 403.

(*l*) *Meux v. Bell*, 1 Hare, 73; *Smith v. Smith*, 2 Cr. & M. 231; *Ward v. Duncombe*, [1893] A. C. 369.

(*m*) *Ward v. Duncombe*, *supra*; *Re Wasdale*, *Brittin v. Partridge*, [1899] 1 Ch. 161.

(*n*) *Dearle v. Hall*, 3 Russ. 1; *Re Wasdale*, *Brittin v. Partridge*, [1899] 1 Ch. at p. 165; *Re Phillips' Trusts*, [1903] 1 Ch. 183.

(*o*) *Hallows v. Lloyd*, 39 Ch. D. 686.

(*p*) *Newman v. Newman*, 28 Ch. D. 674.

(*q*) *Browne v. Savage*, 4 Drew. 635; *Lloyds Bank v. Pearson*, [1901] 1 Ch. 865; *Re Dallas*, [1904] 2 Ch. 385.

(*r*) *Willes v. Greenhill*, 29 Beav. 376, 387.

(*s*) *Re Dallas*, *supra*.

(*t*) *Wise v. Wise*, *supra*.

(*u*) *Stephens v. Green*, [1895] 2 Ch. 148, overruling *Re Booth*, 21 L. T. (o.s.). 239, and explaining *Bridge v. Beadon*, L. R. 3 Eq. 664.

Paragraphs
1241—1243

Time at
which notice
takes effect.

Notice to
Paymaster-
General of
security on
fund in court
useless.

Incumbrancer
on funds in
court should
obtain stop
order.

1241. If notice of an incumbrance be left at a place of business after business hours, it operates only from the time at which, in the ordinary course of business, it would be opened and read (*x*).

1242. Notice to the Paymaster-General of a charging order upon a fund in court, is useless for the purposes of priority; for though memoranda of such orders are entered in the office of the Paymaster-General, they are not considered to be any restraint upon the fund, and a doubt has been judicially expressed, whether, under such circumstances, it is proper to enter them rather than any other charge (*y*).

1243. An incumbrancer (*z*) upon a fund in court should apply for a stop order, of which notice should be given to all persons who have obtained similar orders upon the fund (*a*), and which will be as effectual as notice in other cases in giving priority (*b*), and will give a better right than an earlier notice to the trustee (*c*); if (and only if) the mortgagor claims directly under the trustees whose trust is being administered by the court (*d*) (**1246**). But, of course, it will not give priority over a prior mortgagee of whose mortgage the party obtaining the stop order had notice *when he made his advance*, although such prior mortgagee may have omitted to obtain a stop order himself (*e*). Where, however, the second incumbrancer was ignorant of the prior mortgage when he made his advance, he will get priority by means of a stop order obtained *after* he is informed of the first mortgage (*f*). Like notice, also, it applies only to the particular charge in respect of which it is obtained, though it be granted against the whole fund (*g*). If, after the stop order have been obtained, the share is carried over to the account of the mortgagor and his incumbrancers, a stop order obtained by a later mortgagee will not affect the priority of him who obtained the first, though it seems it would be otherwise if the fund were carried over to the account of the mortgagor alone (*h*). The right thus acquired by a *puisne* incumbrancer without notice, cannot be disturbed by

(*x*) *Calisher v. Forbes*, L. R. 7 Ch. 109.

(*y*) *Warburton v. Hill*, Kay, 470.

(*z*) *Greening v. Beckford*, 5 Sim. 195.

(*a*) *Hulkes v. Day*, 10 Sim. 41. Since the Judicature Acts, it is not necessary for a person who has recovered judgment in a Division other than the Chancery Division of the High Court, to obtain a charging order before applying for a stop order on a fund standing to the credit of the Chancery Division (*Hopewell v. Barnes*, 1 Ch. D. 630).

(*b*) *Greening v. Beckford*, *supra*; *Warburton v. Hill*, Kay, 470.

(*c*) *Pinnock v. Bailey*, 23 Ch. D. 497.

(*d*) *Stephens v. Green*, [1895] 2 Ch. 148.

(*e*) *Re Hamilton's Windsor Ironworks, Exp. Pitman and Edwards*, 12 Ch. D. 707, 711; *Re Holmes*, 29 Ch. D. 786.

(*f*) *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460; *Ward v. Royal Exchange Shipping Co.*, 58 L. T. 174.

(*g*) *Macleod v. Buchanan*, 33 Beav. 234.

(*h*) *Lister v. Tidd*, L. R. 4 Eq. 462.

a mere notice to the Paymaster-General, who is not a trustee of the funds in his hands, but only the agent of the court (1242). Paragraphs
1243—1246

Where part of a mortgaged fund is in court, and part remains in the hands of the trustees, a stop order should be obtained as to the first part, and notice should be given to the trustees as to the second (i).

1244. When a person who has a lien upon a fund, of which he is the holder, pays it into court, he should state his claim and obtain a stop order, otherwise he may lose his priority as against a creditor without notice of the lien, who gets such an order (k). But if before conversion and payment into court of the proceeds of incumbered property, an incumbrancer has completed his title by giving notice to the holder, the priority of the latter will not be affected by an earlier stop order obtained by another claimant (l). So if there be no fund in court which could be the subject of a stop order before the bankruptcy of the assignor, and the assignee have given notice, he will have a better right than the bankruptcy trustee to the fund when brought into court (m). And until the court has made itself the trustee, by dealing with the fund, or so long as anything remains to be done in connection with it, wherein the trustee's concurrence is necessary, notice to him will give priority (n). Trustee
paying
money into
court who
claims a lien
on it must
get stop
order.

It has, however, been held, that if the trustee himself make the advance, the fund being in court, he is bound to obtain a stop order, so that any other person who proposes to make an advance may ascertain if the fund is incumbered (o).

1245. When several stop orders have been obtained on the same day, a prior notice by one of the creditors will give priority to his claim (p). Priority
between con-
temporaneous
stop orders.

1246. It seems that notice will be properly given to trustees of a fund which they have paid into court, until the court by dealing with the fund has itself become the trustee (q); or so long as anything remains to be done in connection with the fund, wherein the concurrence of the trustee is necessary. Thus where part of an Notice with
regard to
fund in court
where court
has not dealt
with it.

(i) *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686; affirmed 32 Ch. D. 460.

(k) *Swayne v. Swayne*, 11 Beav. 463.

(l) *Brearcliff v. Dorrington*, 4 De G. & Sm. 122; *Livesey v. Harding*, 23 Beav. 141; see *Elty v. Bridges*, 2 Y. & Coll. C. C. 486; *Re Marquis of Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727.

(m) *Day v. Day*, 1 De G. & J. 144.

(n) *Warburton v. Hill, Kay*, 470; *Matthews v. Gabb*, 15 Sim. 51; *Thompson v. Tomkins*, 2 Dr. & Sm. 8.

(o) *Elder v. Maclean*, 3 Jur. (N.S.) 283; obs. on *Mutual Life Assurance Society v. Langley*, *supra*.

(p) *Timson v. Ramsbottom*, 2 Keen, 35.

(q) *Warburton v. Hill, Kay*, 470.

Paragraphs
1246—1250

estate had been sold under a decree (*r*), and the produce paid into court, notice of an assignment of a share of the money was given to the trustee for sale, and held sufficient without a stop order; because the sale of the residue of the estate could not be had without the trustee's concurrence. And payment into court under the Trustee Act, 1893, does not divest the trustee of his office, so as to render a notice to him ineffectual (*s*). Where the *puisne* incumbrance was effected upon a fund already in court, and both incumbrancers obtained stop orders on the same day, and so both failed to acquire any priority, a prior notice given by one of them to the trustee was held (*t*) to be effectual.

Where it is determined in a suit that a trustee is affected by notice of an incumbrance, but no persons are *in esse* who are objects of the trust, the proper course is not to make a declaration purporting to bind the issue, but merely to declare that the trustee had notice (*u*).

Person
notified is
bound to
accept the
notice.

1247. The holder of, or other person having any control over, the property concerning which the notice is given, is bound to accept the notice (*x*); and, if he disregard it and part with the fund, may be compelled to make it good to the person entitled. But he is not bound to inform the giver of the notice, that he himself has a charge upon the fund (*y*). The notice also will bind if properly served upon the agent of the person intended to be bound, though the latter, in compliance with the direction of his principal, has not forwarded the notice to him (*z*). Neither will it make any difference in the case of a company or association, that they have no rules or provisions applicable to the receipt of such notices (*a*), or that they do not require notices to be given of assignments (*b*).

Notices of
equitable
mortgages of
ships.

1248. The Merchant Shipping Act, 1894 (*c*), however, declares, that no notice of any trust, express, implied, or constructive, shall be entered in the register books of such ships, or be receivable by the registrar; but this does not exclude the existence of equitable interests in ships (**140**). A similar clause was contained in the Companies Act, 1862, s. 30, and is now reproduced in the Companies Consolidation Act, 1908, s. 27 (**25, 1238**).

Notices to
femes
covertes
and infants.
Notices only
effectual

1249. A *feme coverte* or an infant is just as much bound by notice as an adult (*d*).

1250. The notice will be effectual only when the fund is in the hands of the holder on behalf of the mortgagor, and priority will

(*r*) *Matthews v. Gabb*, 15 Sim. 51. (*s*) *Thompson v. Tomkins*, 2 Dr. & Sm. 8.

(*t*) *Timson v. Ramsbottom*, 2 Keen, 35. (*u*) *Wise v. Wise*, 2 Jo. & Lat. 403.

(*x*) *Williams v. Thorp*, 2 Sim. 257; *Re Hennessy*, 2 Dru. & War. 555.

(*y*) *Re Lewer, Exp. Wilkes*, 4 Ch. D. 101.

(*z*) *Re Hennessy*, 2 Dru. & War. 555.

(*a*) *Williams v. Thorp*, 2 Sim. 257.

(*b*) *Exp. Patch*, 7 Jur. 820.

(*c*) 57 & 58 Vict. c. 60, s. 56.

(*d*) *Per* Lord ST. LEONARDS, *Jones v. Kearney*, 1 Dru. & War. at p. 166. As to notice under a power of sale binding an infant heir, see *Tracey v. Lawrence*, 2 Drew. 403.

follow the date of the notices after that time (*e*). But the notice does not disturb the order of priority until the fund has reached the holder's hands, or has become due from him. Therefore an assignee who gives notice at any time before that period, will retain the priority which is given by the date of his security, against another incumbrancer of later date who has given an earlier notice (*f*). This rule has been applied to an attachment (*g*) issued out of the Court of the Lord Mayor of London, against a fund, before it has come to the trustee's hands.

Paragraphs
1250—1251

where fund is
in the hands
of person
notified.

A result of this rule is, that an incumbrancer of later date may obtain priority, notwithstanding the utmost diligence of one earlier in time in giving notice of his security. For if the latter incumbrance be made in favour of the trustee or holder of the fund himself, no notice by the owner of the prior incumbrance will affect the right of the trustee. The notice will not operate before the fund comes into his possession; and when he receives it, the notice of his own security will first attach and will give him precedence (*h*).

Notice should nevertheless be given at the earliest period, for though the trustee has priority in respect of all charges existing in his favour at the date of the notice, he cannot afterwards acquire any new charge or right of set-off, and he is from that time bound to withhold all further payments on account of the mortgagor, unless made with the mortgagee's consent (*i*).

The priority of the holder of the fund, extends not only to actual charges, but to all rights of lien, set-off, and other equities existing between him, or the estate out of which the fund is payable, and the person entitled to the fund subject to the incumbrances (*k*).

1251. Priority may be forfeited by neglect to send notice, where there is time and a reasonable opportunity of communication (*l*). But a mortgagee is not bound to take means for giving notice which may prove useless and burthensome; and therefore need not send a notice to meet the master of a ship on a distant and roving voyage, though by doing so his title may be earlier completed. It is sufficient if he give the notice, or take possession at the first opportunity (*m*). And a mortgagee who does all in his power to complete his title by giving notice, will not be postponed

Omission to
give notice
immaterial if
it could not
reasonably
be given.

(*e*) *Addison v. Cox*, L. R. 8 Ch. 76; *Johnstone v. Cox*, 16 Ch. D. 571; *Re Dallas*, [1904] 2 Ch. 385; *Re Kinahan's Trusts*, [1907] 1 I. R. 321.

(*f*) *Buller v. Plunkett*, 1 Johns. & H. 441; see *Earl of Suffolk v. Cox*, 15 W. R. 733.

(*g*) *Webster v. Webster*, 31 Beav. 393.

(*h*) *Somerset v. Cox*, 33 Beav. 634; *Roxburghe v. Cox*, 17 Ch. D. 520.

(*i*) *Stephens v. Venables*, 30 Beav. 625.

(*k*) *Webster v. Webster*, *supra*; *Stephens v. Venables*, *supra*; *Roxburghe v. Cox*, 17 Ch. D. 520; see *Willes v. Greenhill*, 29 Beav. 376; *Nelson v. London Assurance Co.*, 2 Sim. & St. 292.

(*l*) *Exp. Lucas*, *Re Gwyer*, 3 De G. & J. 113.

(*m*) *Feltham v. Clark*, 1 De G. & Sm. 307; *Langton v. Horton*, 1 Hare, 549.

Paragraphs 1251—1253 to another whose security is of later date, but who has been able to give earlier notice. Therefore, where there was a mortgage of a ship and cargo, and the cargo was transhipped in a distant port, and again mortgaged without notice of the first security, and the holder of the latter gave notice to the consignees of the cargo as soon as he heard of the transhipment, he was not postponed, although the second mortgagee had given earlier notice (*n*).

Rule as to giving notice binding on bankruptcy trustees except under order and disposition clause.

1252. The rule as to giving notice is binding upon the trustee in bankruptcy of a person interested in the fund (*o*), because the bankruptcy trustee stands in no better position than the bankrupt, (**1227**), and is equally subject to all the rules concerning equitable rights.

The bankruptcy trustee of the assignor of such property as falls within the order and disposition clause of the Bankruptcy Act (*p*) so far stands in a higher position than the bankrupt, that whereas under ordinary circumstances the title of the particular assignee is complete as between him and the assignor, without any notice by the former (the notice being material only as between the assignee and a third party, and the absence of notice alone being no evidence of the invalidity of the assignment (*q*)), the bankruptcy trustee of the assignor, where notice has not been given at all or until after the bankruptcy, will be entitled to the fund against the particular assignee himself. And this holds good whether it fall into possession before or after the bankruptcy, and though the bankrupt's interest was only contingent; because the fund is within the order and disposition of the bankrupt with the consent of the particular assignee, of which consent his neglect to give notice is evidence (*r*).

Order and disposition clause inapplicable where mortgagor's fraud

1253. The bankruptcy trustee however will not become entitled, where the mortgagee would have completed his title but for the false representation of the mortgagor (*s*); nor where the absence of notice does not arise from neglect (*t*). Therefore assignees in

(*n*) *Feltham v. Clark*, *supra*.

(*o*) *Re Barr's Trusts*, 4 K. & J. 219; *Lloyd v. Banks*, L. R. 4 Eq. 223; see L. R. 3 Ch. 488; *Re Russell's Policy Trusts*, L. R. 15 Eq. 26; *Palmer v. Locke*, 18 Ch. D. 381.

(*p*) Bankruptcy Act, 1869, s. 15; 1883, s. 44 (iii.).

(*q*) *Dearle v. Hall*, 1 Russ. at. p. 24; *Cook v. Black*, 1 Hare, 390. See *Hobson v. Bell*, 3 Jur. 196.

(*r*) *Bartlett v. Bartlett*, 1 De G. & J. 127; *Exp. Lucas, Re Gwyer*, 3 De G. & J. 113; *Re Vickress' Trusts*, 7 W. R. 542; *Exp. Caldwell, Re Currie*, L. R. 13 Eq. 188. The decision in *Bartlett v. Bartlett* must also be taken to have overruled *Re Pole's Trust*, 2 Jur. (N.S.) 685, where it was held that the assignee by deed of a reversionary interest in money, who had not given notice, was entitled to priority over the assignor's assignees in insolvency under the Indian Act, 11 & 12 Vict. c. 21, s. 7, which contains an order and disposition clause. See *Grainge v. Warner*, 13 W. R. 833. *Exp. Barry*, L. R. 17 Eq. 113, a case of a chose in action, and therefore not within the rule under the Act of 1869. The cases of *Stuart v. Cockerell*, L. R. 8 Eq. 607; and *Re Russell's Policy Trusts*, L. R. 15 Eq. 26, ignore the effect of the statute on the title of assignees in bankruptcy. See *Bartlett v. Bartlett*, *supra*.

(*s*) *Exp. Bell*, De G. 577.

(*t*) *Re Rawbone*, 3 K. & J. 476.

bankruptcy were not preferred to an assignee under a prior insolvency, who, before payment of the fund into court, had no knowledge or notice of the insolvent's interest; there being under such circumstances no consent, or *laches* (which would be equivalent to consent), to the possession of the bankrupt (*u*).

Paragraphs
1253—1255

prevented
completion of
mortgagee's
title.

1254. One who acquires a legal title to personalty will hold it free from a trust to which it was subject in the hands of the transferor, if the transferee took without notice of the trust, even if he did not complete his legal title until after notice. But the assignee of a *chose in action* except it be "negotiable" (**1231**) takes subject to all trusts and equities which attach to it as against the assignor (*x*) (**153**). Hence a sub-mortgage will fall with the original mortgage if the latter be set aside for fraud (*y*). And where a security by the continuing partners of a firm to the retiring partner was assigned by him, it was held that the assignees took subject to the equitable right of set-off of the continuing partners, and to the other equities which affected the security (*z*).

Legal title to
personalty
gives same
priority as
in case of
land.

1255. The title of a person, who claims personalty under a trust, is completed by the declaration of trust; and a subsequent incumbrancer cannot gain priority over the *cestui que trust* by giving notice. Therefore where (*a*) shares in a banking company stood in the name of a trustee, who executed a declaration of trust of them, of which no notice was given to the company, and afterwards pledged part of them, together with others belonging to himself, to the company, it was held, that against the latter, the *cestui que trust* were entitled to such of the shares pledged, as could be ascertained to have belonged to them. The authority of Lord *Langdale* is indeed against this doctrine (*b*); but V.-C. *Wigram's* decision was affirmed in the House of Lords, and has been since followed by Lord *Romilly*, M.R. (*c*); and Lord *Langdale's* decision was expressly overruled by the Court of Appeal in *Société Générale de Paris v. Tramways Union Co.* (*d*). Lord *Romilly* attempted to reconcile the conflicting decisions, on the ground that a violation of duty, and something like fraud by the assignor, governed the case of *Martin v. Sedgwick*; but although such circumstances existed they do not appear to have formed the ground of the decision.

Declaration
of trust of
choses in
action
requires no
notice to be
given to
debtors, etc.

(*u*) And see *Exp. Richardson*, Buck. 480.

(*x*) *Moore v. Jervis*, 2 Coll. C. C. 60; *Priddy v. Rose*, 3 Mer. 86; *Cockell v. Taylor*, 15 Beav. 103; *Ord v. White*, 3 Beav. 357; *Dunster v. Lord Glengall*, 3 Ir. Ch. R. 47; *Cole v. Muddle*, 10 Hare, 186.

(*y*) *Cockell v. Taylor*, *supra*; *Barnard v. Hunter*, 2 Jur. (n.s.) 1213; *Brandon v. Brandon*, 7 De G. M. & G. 365.

(*z*) *Smith v. Parkes*, 16 Beav. 115.

(*a*) *Pinkett v. Wright*, 2 Hare, 120; 12 Cl. & Fin. 764, *sub nom. Murray v. Pinkett*.

(*b*) *Martin v. Sedgwick*, 9 Beav. 333.

(*c*) *Clack v. Holland*, 18 Jur. 1007.

(*d*) 14 Q. B. D. 424; (*aff. sub nom. Société Générale de Paris v. Walker*), 11 App. Cas. 20.

Paragraphs
1256—1258

Right of
mortgagee
of ship to
freight if he
takes
possession.

1256. The right to a freight earned, or to be earned, by a mortgaged ship on the voyage during which he takes possession belongs to the mortgagee when he takes possession (*e*); and a mortgagee of such freight may be postponed to an earlier mortgagee of the ship, or to a later mortgagee without notice, who first took or claimed from the master, possession of the ship and freight (*f*). But a mortgagee is not entitled to freight accrued due and payable before he took possession (although it may then remain unpaid) as against even a subsequent assignee (*g*). But if the mortgagee do not actually or constructively take possession, the mortgagor or subsequent assignee will take it and will not be liable to account (*h*). The arrival of the ship in the docks is not such a completion of the voyage as will deprive a mortgagee of his right to the freight, if he do not take possession until the happening of that event. It is enough if he take possession before the complete discharge of the cargo; for the right to freight does not accrue until the delivery of the goods, unless there be a stipulation to the contrary (*i*); and so long as they remain on board undelivered, the possession of them is as much within the reason of the rule whilst the ship is in, as whilst she is on her way to, the docks.

The mortgagee's right to the freight remains, although, from his security being only upon a part of the ship, he cannot take exclusive possession, or prevent delivery of the cargo by the owner of the remainder; for, although unable personally to take possession, if he give notice to the part owner in possession and require payment of his share of the freight, he will entitle himself to receive such share of all freight accruing and not actually due at the time of the notice (*k*).

The mortgagee's neglect to take such early possession will not, however, give any better right to a subsequent incumbrancer, who had notice of the prior security, when he took his own: in which matter a ship-broker, who has advanced money for the ship's use, seems to be in no better plight than any ordinary incumbrancer (*l*).

1257. A *puisne* incumbrancer upon chattels cannot, by taking possession, get priority over an earlier incumbrancer whose security has been duly registered under the Bills of Sale Acts (*m*).

1258. Where the parties are alike innocent and are equally diligent in completing their title, priority in the date of their respective

(*e*) *Keith v. Burrows*, 2 App. Cas. 636; *Shillito v. Biggart*, [1903] 1 K. B. 683.

(*f*) *Brown v. Tanner*, L. R. 3 Ch. 597; *Wilson v. Wilson*, L. R. 14 Eq. 32.

(*g*) *Shillito v. Biggart*, *supra*.

(*h*) *Cato v. Irving*, 5 De G. & Sm. 210; *Brown v. Tanner*, L. R. 3 Ch. 597; *Rusden v. Pope*, L. R. 3 Ex. 269; *Liverpool Marine Credit Co. v. Wilson*, L. R. 7 Ch. 507.

(*i*) *The John*, 3 W. Rob. 179; *Brown v. Tanner*, *supra*.

(*k*) *Cato v. Irving*, 5 De G. & Sm. 210; see *Camden v. Anderson*, 5 T. R. 709.

(*l*) *Gibson v. Ingo*, 6 Hare, 112.

(*m*) *Exp. Allen, Re Middleton*, L. R. 11 Eq. 209.

Rule as to
possession
of chattels
does not
defeat a
registered
bill of sale.

securities will, as in equitable mortgages of realty (1184), give the advantage. This may be illustrated by a case in which a person took a mortgage of a ship at sea, without notice that the master had a power of attorney from the mortgagor to sell his interest in the ship. Upon this power the master in fact acted, and sold after the date, but to a person who had no notice of the mortgage. At the end of the return voyage, each party took possession; but the right of the mortgagee was upheld, though upon the terms of his making an allowance for the expenses of fitting the ship for the home voyage (n). A stipulation which is founded upon the rule, that the freight is liable for the expenses of the voyage in which it is earned (o), and one part owner, being entitled as against the others to have it so applied, the mortgagee cannot put his right higher than that of the part owner from whom he derives his title (p).

Paragraphs
1258—1259

Where two
conflicting
mortgages
of personalty
are equally
diligent,
they take in
order of date.

SECTION II.

Of Priority under the Maritime Law.

	PARAGRAPH
<i>Priority determined by lex fori, but generally they rank in inverse order of date</i>	1259
<i>Statutory lien for salvage of human life, wages, pilotage, etc.</i>	1260
<i>Liens of master</i>	1261
<i>Shipwright's lien</i>	1262
<i>Lien for damage may override mortgage</i>	1263
<i>Maritime lien may be lost by neglect</i>	1264
<i>Mortgagee has priority over claims of shipwrights</i>	1265

1259. The precedence of maritime hypothecations and liens is to be determined according to the *lex fori* (q), and the general rule

Priority
determined
by *lex fori*,
but generally
they rank in
inverse order
of date.

(n) *Cato v. Irving*, 5 De G. & Sm. 210.

(o) *Green v. Briggs*, 6 Hare, 395; *Lindsay v. Gibbs*, (No. 2) 26 Beav. 51. The expenses include insurance; at least, as against the assignee of one of the part owners who has not given notice of his interest to the other part owners. *Id.*

(p) *Cato v. Irving*, *supra*; *Alexander v. Simms*, 18 Beav. 80, (affirmed 5 De G. M. & G. 57).

(q) *The Union*, 30 L. J. Ad. 17; Lush. 128. The following is the order of priority pointed out by the French Code:—1. The costs of sale and division of the proceeds; 2. Pilotage and other dues; 3. Costs of watching; 4. Rent of warehouses for rigging and stores; 5. Costs of repairs to ship and rigging since the last voyage, and coming into port; 6. Wages of master and crew employed in the last voyage; 7. Advances to the master for the use of the ship during the last voyage, and repayment of the price of goods sold by him for the same purpose; 8. Money due to the vendor, builders and workmen, if the ship have not yet made a voyage; and to the creditors for stores, works, refitment, provisions, armament and equipment before her departure if she have already sailed; 9. Money lent on the hull, keel, rigging, and stores (*i.e.* on bottomry), for refitting, victualling, arming and equipping before departure; 10. Premiums for insurance of the hull and appendages of the ship for the last voyage; 11. Interest by way of damages to freighters, on default of delivery of their goods, or for repayment of losses suffered by the said goods by default of the captain or crew. In case of deficiency, the creditors mentioned under each of these heads come in *pari passu* in proportion to their interests.

One event in which these privileges will become extinct is when, after a voluntary sale (which must be in writing, and may be either when the ship is at sea or in port),

Paragraphs
1259—1260

concerning them is that the holders have priority over ordinary incumbrancers, and that if maritime hypothecations be given at different periods of a voyage, and the security be insufficient to discharge them all, the last in date shall be paid first (*r*); because by the last loan the ship was preserved, and without it the former lenders would have lost their security; and the bondholders' right extends, in the absence of special provision to the contrary, to the whole value of the property saved (*s*).

For the same reason, if a ship captured by an enemy, and subject to a mortgage, be ransomed, the ransom shall be raised out of the profits, notwithstanding the mortgage (*t*). And if money be raised by *respondentia* on the cargo (264), and be not applied in forwarding it, but the cargo is sent on by the act and at the cost of its owner, the service is in the nature of salvage, and the person who has rendered it will have priority over the holder of the *respondentia* bond (*u*). It is the fact of salvage, in the case of a security, which gives the priority, and the last incumbrancer will not be privileged against the right of a former lender, unless the loan arose out of the destitute state of the master and his inability to get the necessary supplies for his vessel on the personal credit of himself or his employers (*x*). In like manner, in the case of an incumbrance on real estate, where a creditor had prevented the eviction of the lessee by advancing money to pay off arrears of head rent, it was intimated (*y*) that this rule should not be made an instrument, by which the owner, subject to the mortgage, might get a collusive preference for the salvage creditor. Nor will the creditor derive any advantage over a prior incumbrancer, by reason of an advance for the necessity of the ship beyond the actual extent of the bottomry bond. Therefore, where charterers of a ship, with notice of a mortgage, took a bottomry bond which did not cover the expenses incurred, it was held that they could not, as against the mortgagee, set off the excess against the sum which became due under the charter-party (*z*) (1169).

Statutory
lien for
salvage of

1260. The statutory lien for the salvage of human life (576) has priority over other salvage liens (*a*); and the principle of maritime

the ship has made a voyage under the name and at the risk of the purchaser without opposition by the vendor's creditors. The voluntary sale during a voyage does not prejudice the vendor's creditors; the ship or its price being still their pledge, with power to impeach the sale for fraud. (Code de Commerce, 191—193, 195, 196.)

(*r*) *The Sydney Cove*, 2 Dods. Ad. 13; *The La Constancia*, 2 W. Rob. 404. See also *The Veritas*, [1901] P. 304.

(*s*) *The Great Pacific*, L. R. 2 P. C. 516.

(*t*) *Hope v. Winter*, 2 Eq. Ca. Abr. 690.

(*u*) *Cleary v. McAndrew, Cargo Ex Galam*, 2 Moo. P. C. (N.S.) 216.

(*x*) *Brice v. Williams*, Wallis, R. 325; Abbott, 163. See also on the subject *The Ripon City*, (No. 2), [1898] P. 78.

(*y*) *Angell v. Bryan*, 2 Jo. & Lat. 763. (*z*) *Dobson v. Lyall*, 2 Ph. 323, n.

(*a*) 57 & 58 Vict. c. 60, s. 544; *The Coromandel*, Swab. 205.

securities gives to the lien of the mariners for their wages and subsistence (which, to use the expression of Lord *Stowell*, is a sacred lien, lasting as long as a plank remains), precedence over bottomry bonds, and other securities (*b*), whether the wages were earned before or after the date of the bond (*c*). And payments for wages made by the direction of the master on account of the ship or for pilotage, towage, light dues (which are enforceable by distress and must be paid before the ship can be cleared), and dock dues, are entitled to the same priority (*d*). The wages may even be claimed in respect of several voyages, in preference to a bond made during the last of them, where the contract of hiring is continuous, and binds the seaman to remain on board during the whole series of voyages (*e*).

Paragraphs
1260—1261
human life,
wages,
pilotage, etc.

1261. In like manner the master, though also a part owner, will have priority over a mortgagee of ship and freight in respect of his wages; and in respect of supplies to the seamen on account of wages and other disbursements (*e.g.* for coal) (*f*) properly made for the benefit of the ship (*g*). And he has been held to be entitled to the same right in respect of his liability on a bond given by him in a foreign port to save the ship from arrest, and to enable her to earn her freight (*h*). But although by statute the master is put upon the same footing as to wages with the mariners, he cannot set up a lien for his own wages, or for money advanced by him for payment of the wages of the mariners in competition with their lien; for being, by an ancient rule of law, personally liable to them for their wages, whether the security be sufficient or not, he cannot take anything from it to their detriment (*i*). And even the mariners' claim for wages, together with other claims *ex contractu*, will be postponed to a lien for damage against a ship, both as to wages earned before and after the damage (*k*).

Liens of
master.

Neither can the master claim in priority to material-men, where he is part owner, or has made himself personally liable for the necessaries supplied (*l*); or to the bondholder, where, as is usually the case, the master has pledged his own credit for the loan (*m*) besides the security of the ship: though it will be otherwise where

(*b*) *The Sydney Cove*, 2 Dods. Ad. 13; *The Madonna d'Idra*, 1 Dods. Ad. 37; *The William F. Safford*, Lush, 69. (c) *The Union*, 30 L. J. Ad. 17.

(*d*) *The William F. Safford*, Lush, 69; *The St. Lawrence*, 5 P. D. 250. But not payments by a person merely claiming as creditor for money alleged to have been partly paid out in wages (*The New Eagle*, 2 W. Rob. 441); nor payments for reporting ship, or postages. *The St. Lawrence*, *supra*.

(*e*) *The Louisa Bertha*, 14 Jur. 1007.

(*f*) *The Ripon City*, [1897] P. 226.

(*g*) *The Mary Ann*, L. R. 1 Ad. & E. 8; *The Feronia*, L. R. 2 Ad. & E. 65; conf. Barnes, J., in *The Ripon City* [1897], P. 226.

(*h*) *The Limerick*, 1 P. D. 292 and p. 411 (C. A.); *The Benares*, 7 N. of C., Sup. 1.

(*i*) *The Salacia*, Lush. 545.

(*k*) *The Linda Flor*, Swab. 309; *The Elin*, 8 P. D. 39, 129; *The Duna*, 5 L. T. (N.S.) 217; *The Veritas*, [1901] P. 304.

(*l*) *The Jenny Lind*, L. R. 3 Ad. & E. 529.

(*m*) *The William*, Swab. 46; *The Jonathan Goodhue*, Swab. 524.

Paragraphs his personal undertaking is only that he is the master, and in that
 1261—1265 character has a right to hypothecate the ship (*n*). But the rule will be not extended to cases in which the bondholder, for whose protection alone it is made, will not be injured by giving preference to the claim of the master—as where, by marshalling the securities, the claim of the bondholder can be thrown upon the cargo, leaving the ship and freight open to the master (*o*).

Shipwright's
 lien.

1262. The claim for wages and other burthens which form a lien upon the ship when she is brought into the yard of a shipwright for repairs, will be preferred to the shipwright's common law lien, notwithstanding the possession upon which that lien is founded (**627**); it being presumed that he received the ship subject to its existing obligations. And the preferential claim will extend to the usual allowance to foreign mariners for their return to their own country, but not to any continuing claim for wages or necessities supplied after the vessel has come into the hands of the shipwright (*p*). Nor can claims for necessities, or other liabilities which are not perfected at the time of the shipwright's possession, come into competition with his lien (*q*).

Lien for
 damage may
 override
 mortgage.

1263. The right of the creditor by mortgage or bottomry, may be overridden, by the lien of the successful suitor for damage done after the date of the mortgage or bond (**578**); for the creditor for damage may be wholly without remedy, except against the ship, but the other may exercise a discretion as to advancing: and in the case of the bottomry creditor, the risk is covered by the premium. But a bottomry bond, *bona fide* granted for the repairs of a vessel after damage done, will not give way to the earlier lien for damage; the creditor under which himself derives a benefit from the repairs (*r*).

Maritime
 lien may
 be lost by
 neglect.

Mortgagee
 has priority
 over
 claims of
 shipwrights.

1264. The benefit of a maritime lien may be lost by negligence or delay (**567**) (*s*).

1265. A mortgagee of the ship will, of course, have priority over claims for repairs or other necessities of the ship supplied in England by material-men; who, not being in possession, cannot establish a lien (**568**), even though the mortgagee had notice that money had been so laid out for the use of the ship; and the rights against the ship, and the proceeds when it has been sold, are the same (*t*).

(*n*) *The Salacia*, *supra*.

(*o*) *The Edward Oliver*, L. R. 1 Ad. & E. 379; *The Daring*, L. R. 2 Ad. & E. 260; *The Eugénie*, L. R. 4 Ad. & E. 123.

(*p*) *The Gustaf*, Lush. 506; *The Tergeste*, [1903] P. 26.

(*q*) *The Gustaf*, *supra*.

(*r*) *The Aline*, 1 W. Rob. 111.

(*s*) *Harmer v. Bell (The Bold Buccleugh)*, 7 Moo. P. C. 267; *The Europa*, B. & L. 89; *The Fairport*, 8 P. D. 48.

(*t*) *Watkinson v. Bernadiston*, 2 P. Wms. 367; *The New Eagle*, 2 W. Rob. 441. See *The Neptune*, 3 Knapp, 94; *The Scio*, L. R. 1 Ad. & E. 353.

CHAPTER VI.

Of Priority by Statute.

	PARAGRAPH	Paragraph
Section I.—Under the Land Registration Acts	1266—1282	1266
„ II.—Under the Bills of Sale Acts	1283	
„ III.—Under the Policies of Assurance Act	1284—1285	
„ IV.—Under the Ship Registry Acts	1286—1290	
„ V.—Under the Judgment Acts	1291—1311	
„ VI.—Under the Bankruptcy and other Acts	1312—1317	

SECTION I.

Under the Land Registration Acts.

<i>General effect of Land Registration Acts</i>	1266
<i>Registration is not equivalent to notice, and in Middlesex gives no priority except against unregistered instruments, but aliter in Ireland and Yorkshire, and in Middlesex and Ireland notice of prior unregistered instrument preserves its priority</i>	1267
<i>Registered mortgagee does not lose priority over unregistered unless he had notice at date of loan</i>	1268
<i>Mortgagee not bound to inquire as to unregistered incumbrances</i>	1269
<i>Unregistered deed may be sheltered by an earlier registered one</i>	1270
<i>Registered deed of party having no title may prevail against prior unregistered deed of party having title</i>	1271
<i>Register of assignment of a charge confers no priority</i>	1272
<i>Mortgages by deposit and vendor's liens</i>	1273
<i>Registration of appointment under power</i>	1274
<i>Registration protects titles of both mortgagor and mortgagee</i>	1275
<i>Registry does not validate forged deeds</i>	1276
<i>Titles under unregistered wills as against heirs</i>	1277
<i>Contemporaneous registrations in Middlesex</i>	1278
<i>System of caveats in Yorkshire</i>	1279
<i>Registration of rentcharges and annuities have same effect as registration of land in Middlesex</i>	1280
<i>Registration under Land Transfer Acts</i>	1281
<i>Questions of priority under Land Transfer Acts may be decided on summons</i>	1282

1266. Under the Middlesex (a), Yorkshire (b), and Irish (c) General Registration Acts (**51, 1111**), registered instruments have priority over such as are of earlier date, but unregistered. The Middlesex Acts.

(a) 7 Anne, c. 20. The Act does not extend to the City of London nor to the Inn of Court or Serjeants Inn.

(b) 47 & 48 Vict. c. 54 and 48 & 49 Vict. c. 26.

(c) 6 Anne, c. 2 (Ireland).

Paragraph
1266

and Irish Acts, however, do not apply if the owner of the latest registered security had notice of that over which he claims priority (*d*). The Yorkshire Act, on the other hand, applies even where the owner of the later registered security has "actual or constructive notice except in cases of actual fraud" (*e*), which means, according to a recent decision, "fraud in the ordinary popular acceptance of the term, *i.e.*, fraud carrying with it grave moral blame, and not what sometimes has been called legal fraud or constructive fraud, or fraud in the eye of a court of law or a court of equity" (*f*). What the effect of this may be is not clear. The present editors are unable to distinguish any degree of moral obliquity between one who, knowing of another's prior incumbrance, deliberately ignores it, and claims to rank in priority to it, and one who commits any other kind of fraud with the same object. To them it seems that no words less strong than "actual fraud" could fitly characterize such a transaction. The framers of the Act, however, in excluding *actual notice*, seem to have differentiated such a case from actual fraud; but it seems regrettable that they did not confide so delicate a distinction to the world at large.

None of the Registration Acts apply so as to give the registered instrument priority, where it is only intended to pass such estate or interest only as the mortgagor has in equity; *ex.gr.*, a deed of assignment for the benefit of creditors does not take priority of a prior unregistered mortgage (*g*). At law, an unregistered instrument was held to be fraudulent and void, even under the Middlesex and Irish Acts, according to the words of the statutes, as against a subsequent purchaser for valuable consideration, though he took with notice of the unregistered security (*h*). But it was held in equity (*i*) that the effect of these Acts was neither to vitiate an unregistered instrument, nor to give an instrument any greater force by virtue of registration than it originally had, as against an earlier unregistered instrument; *but only to avoid the latter as against the former (k)*—thus letting in the doctrine of notice. And this is because, according to the equitable construction, the intention was to give notice to persons who for want of it might be imposed upon by a prior security, and not to shelter those who had it already (*l*).

(*d*) *Re Wight's Mortgage Trust*, L. R. 16 Eq. 41; *Credland v. Potter*, L. R. 18 Eq. 350 (affirmed L. R. 10 Ch. 8).

(*e*) 47 & 48 Vict. c. 54, s. 14.

(*f*) *Per STIRLING, J., Battison v. Hobson*, [1896] 2 Ch. 403.

(*g*) *Jones v. Barker*, [1909] 1 Ch. 321.

(*h*) *Doe d. Robinson v. Allsop*, 5 B. & Ald. 142.

(*i*) *Jones v. Gibbons*, 9 Ves. 407.

(*k*) *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609. As to the effect of the Indian Registration Act, 1866, see Macpherson on the Law of Mortgage in Bengal and the North West Provinces, Ch. 5. *Hicks v. Powell*, L. R. 4 Ch. 741.

(*l*) *Blades v. Blades*, 1 Eq. Ca. Abr. 358; *Ford v. White*, 16 Beav. 120; *Johnson v. Holdsworth*, 1 Sim. (N.S.) 106; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Lord Forbes v. Deniston*, 4 Bro. P. C. 189; *Cheval v. Nichols*, Str. 664.

v. For a person who takes and registers a conveyance, with a view to defeat the charge of another, takes with an ill conscience, and his purchase shall never be set up in equity. At the same time, the fact that a person has registered his security, is not of itself constructive notice to a subsequent incumbrancer who may have neglected to search (*m*).

Paragraphs
1266—1267

1267. From which consideration it follows:—

1st. That with regard to Middlesex land a legal mortgagee without notice, and duly registered, shall be preferred to an equitable mortgagee, also duly registered, and earlier in time than the other (*n*); and that a prior legal mortgagee, duly registered, lending a further sum without actual notice of a *puisne* incumbrance (*o*), or an equitable mortgagee in like manner getting in the legal estate (*p*), may tack their respective securities, although the *mesne* incumbrance be duly registered—for the registration working no notice, the legal estate prevails according to the doctrine of tacking (**1133**). But under the Irish Act and the Yorkshire Act (*q*), priority is according to the time of registration (**51**), and the doctrine of tacking, by which the prior legal deed draws to it the subsequent unregistered instrument, to the prejudice of the *mesne* registered instrument, is negatived (*r*). Under the Irish and Yorkshire Acts, therefore, an instrument, (though equitable only, and subsequent in date and execution), becomes effectual by registration against all other incumbrancers (*s*), whether legal or equitable. But this is by the mere force of the words of the Act, and does not imply that registration amounts to notice under these any more than under the Middlesex Acts (*t*). And it is only a deed untainted with fraud (“actual fraud” under the Yorkshire Acts), which will acquire priority by registration (*u*).

Registration is not equivalent to notice, and in Middlesex gives no priority except against unregistered instruments, but *aliter* in Ireland and Yorkshire, and in Middlesex and Ireland notice of prior unregistered instrument preserves its priority.

2nd. That under the Middlesex Act and the Irish Act (*x*), a subsequent incumbrancer, taking with notice of a prior security, shall not, although that security be unregistered, gain a preference over it in equity by registering his own (*y*); because the defect

(*m*) By the Yorkshire Act, 47 & 48 Vict. c. 54, s. 15, the register *was* made notice, but this section was repealed in the following year, 48 & 49 Vict. c. 26, s. 5.

(*n*) *Morecock v. Dickins*, Amb. 678.

(*o*) *Bedford v. Backhouse*, 2 Eq. Ca. Abr. 615.

(*p*) *Cator v. Cooley*, 1 Cox. 182.

(*q*) Act of 1884, ss. 14 and 16.

(*r*) *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Latouche v. Dunsany*, 1 Sch. & Lef. 137. See *Carlisle v. Whaley*, L. R. 2 H. L. 391.

(*s*) *Eyre v. Dophlin*, 2 Ba. & Be. 290—300; *Thompson v. Simpson*, 1 Dru. & War. 459; *M'Neill v. Cahill*, 2 Bligh, 228.

(*t*) *Bushell v. Bushell*, *supra*; *Underwood v. Lord Courtown*, 2 Sch. & Lef. 41; *Pentland v. Stokes*, 2 Ba. & Be. 75.

(*u*) *Underwood v. Lord Courtown*, *supra*.

(*x*) *Agra Bank v. Barry*, L. R. 7 H. L. 135.

(*y*) *Blades v. Blades*, 1 Eq. Ca. Abr. 358; *Cheval v. Nichols*, Str. 664; *Sheldon v. Cox*, Amb. 624; *Le Neve v. Le Neve*, 3 Atk. 646; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Lord Forbes v. Deniston*, 4 Bro. P. C. 189; *Johnson v. Holdsworth*, 1 Sim. (N.S.) 106; *Tunstall v. Trappes*, 3 Sim. 286.

Paragraphs arising from notice cannot be cured by the registration. But as
 1267—1271 above pointed out, this doctrine is expressly excluded from the Yorkshire Acts.

Registered mortgagee does not lose priority over unregistered unless he had notice at date of loan.

1268. But the subsequent incumbrancer even in Middlesex or Ireland will not be affected, unless he had notice of the unregistered prior deed *when he took his security* (z). For his registering, in consequence of notice received afterwards, is no more than happens when an incumbrancer without notice protects himself by getting in an outstanding term, upon receiving notice of the *mesne* charge. It has been said that the notice must be so clear and undoubted, that the registration of another deed in prejudice of the title would amount to fraud; no suspicion of notice being sufficient to induce the court to break in upon the statute (a). Suspicion of notice, however, is not notice; but clear constructive notice, such as arises from the agent to the principal, is now held to bind the later incumbrancer; though no question of fraud or conscience arises out of such notice (b).

Mortgagee not bound to inquire as to unregistered incumbrances.

Unregistered deed may be sheltered by an earlier registered one.

1269. A purchaser or mortgagee is not bound to make inquiries with a view to the discovery of unregistered instruments (c).

1270. An unregistered assignment may be sheltered under the earlier registered deed, and have priority over an unregistered deed of earlier date than either of them (d); but a later registered deed will not, necessarily protect that which is earlier and unregistered, supposing it to be otherwise good. Thus where there were two conflicting unregistered leases and the later of them in point of date was mortgaged, and afterwards sold, and the mortgage and purchase deeds were both duly registered, the registry was held to be insufficient as against the first of the two leases (e).

Registered deed of party having no title may prevail against prior

1271. Under the Irish Act also, the subsequent registered deed of a person having in fact no interest, but having, by the neglect of the real owners, an appearance of a legal title, was allowed precedence (f) over an earlier unregistered deed. The circumstances

(z) *Elsey v. Lutyens*, 8 Harc. 159; and see *Essex v. Baugh*, 1 Y. & Coll. C. C. 620.

(a) *Hine v. Dodd*, 2 Atk. 275; *Jolland v. Stainbrigde*, 3 Ves. Jun. 478; *Wyatt v. Barwell*, 19 Ves. 435; *Chadwick v. Turner*, L. R. 1 Ch. 310; see *Natal Land, etc., Co. v. Good*, under the law of Natal, L. R. 2 P. C. 121.

(b) *Marjoribanks v. Hovenden*, Dru. 11; *Rolland v. Hart*, L. R. 6 Ch. 678; and see *Leuchan v. McCabe*, 2 Ir. Eq. R. 342; and *Wormald v. Maitland*, 35 L. J. Ch. 69, dissented from in *Agra Bank v. Barry*, L. R. 7 H. L. 135; *Bradley v. Riches*, 9 Ch. D. 189. In *Popham v. Baldwin*, 2 Jones 320, notice of a tenancy, and in *Wallace v. Donegal*, 1 Dru. & Wal. 461 (affirmed p. 490 & 5 Cl. & F. 629), *lis pendens*, were held not to be such notice as would avoid the effect of the Registry Act, according to *Wyatt v. Barwell*.

(c) *Agra Bank v. Barry*, L. R. 7 H. L. 135, *per* Lord SELBORNE; *Lee v. Clutton*, 45 L. J. Ch. 43.

(d) *Warburton v. Loveland*, 6 Bligh. (N.S.) 1.

(e) *Honeycomb v. Waldron*, Str. 1064; *Jack v. Armstrong*, 1 Huds. & Bro. 727; as explained by Lord TRURO in *Mill v. Hill*, 3 H. L. C. 828 at p. 862; and see *Battersby v. Rochfort*, 2 Jo. & Lat. 431.

(f) *Warburton v. Loveland*, 6 Bligh (N.S.) 1.

were, that a husband, party to a marriage settlement by which his wife conveyed her leaseholds to trustees, upon trust for herself and her children, with a trust for the husband to receive the rents during his life, made a lease after the marriage, to which the trustees were postponed; on the ground, that having permitted him by their neglect to register, to retain the appearance of a marital right, neither they, nor those claiming under them, could set up their deed against the persons deluded by this appearance of right.

Paragraphs
1271—1273

unregistered
deed or party
having title.

In the case last cited the question arose, whether it be necessary for the gaining of priority by registration, that both the earlier and later deeds should be the deeds of the same grantor; and on appeal to the House of Lords from Ireland, it was the opinion of the judges (with which the House agreed), that no such restriction was intended. And it was said, that the mischief to the subsequent purchaser, which the Acts were meant to prevent, was the same, whether the secret conveyance or charge arose from the deed of his immediate grantor, or of a former owner of the estate. But a different opinion was some years earlier expressed (*g*) by the Court of King's Bench in Ireland, which considered, that the policy of the Act was confined to the dealings of one party, and to the limits of one life; and that the devisee or heir of the seller of an estate where the latter had conveyed by an unregistered deed, could not, by a registered deed, vest a good title in a third person; for there the seller having already parted with all his interest, the grantor of the registered deed had nothing to convey. And on that principle they decided, that a registered assignment of property, seized and sold by the sheriff, was of no force against an earlier unregistered conveyance by the debtor. Yet it was held to be clear, that if the second deed had been made by the same grantor as the first, it should have prevailed after registration; for, by the very terms of the Act, the other being unregistered, would, as against it, have been fraudulent and void.

1272. The registration of an assignment of a sum of money, charged upon land in Middlesex, is not within the Act, and will confer no priority (*h*); and *à fortiori* the Act does not apply to the proceeds of sale of land (*i*).

Register of
assignment
of a charge
confers no
priority.

1273. An equitable mortgage by deposit, accompanied by a written memorandum, has always been capable of being registered (*k*); but, prior to 1884, not where there was no memorandum (*l*).

Mortgages
by deposit
and vendor's
liens.

(*g*) *Fury v. Smith*, 1 Huds. & Bro. 735; see *Jack v. Armstrong*, 1 Huds. & Bro. 727; *Honeycomb v. Waldron*, Str. 1064.

(*h*) *Malcolm v. Charlesworth*, 1 Keen, 63.

(*i*) *Arden v. Arden*, 29 Ch. D. 702.

(*k*) *Neve v. Pennell*, 2 H. & M. 170; *Moore v. Culverhouse*, 27 Beav. 639; and see *Bradley v. Riches*, 9 Ch. D. 189, but *cf. Wright v. Stanfield*, 27 Beav. 8.

(*l*) *Sumpter v. Cooper*, 2 B. & Ad. 223.

Paragraphs 1273—1278 Under the Yorkshire Act, 1884, however, equitable mortgages by deposit, even without memorandum, and also vendors' liens, must be registered (*m*). On the other hand, a mere agreement by B. to build on his land with money advanced by A., and for the sale of such buildings to A. when completed, is not capable of being registered under the Yorkshire Act (*n*), or, it would seem, under the Middlesex Act.

Registration of appointment under power. 1274. An appointment made in exercise of a power will be postponed to a subsequent incumbrance which was registered earlier, whether, it seems, the deed which created the power were registered or not (*o*).

Registration protects titles of both mortgagor and mortgagee. 1275. The registration protects the equitable title of the mortgagor, as well as the legal title of the mortgagee; and prevents the lessee of the latter from claiming a title adversely to the former (*p*).

Registry does not validate forged deeds. 1276. The registry will not give validity to a forged deed (*q*); and no priority will be gained by an informal registration (*r*). For instance, if the grantor have executed, and the grantee have done so afterwards, in the presence of other witnesses, by one of whom only the memorial is attested. The Act makes one of the witnesses to the deed a necessary witness to the memorial; the grantee's execution is, however, not the execution of the deed, but may altogether be dispensed with. The grantor's is the real execution, and one of his witnesses must attest the memorial.

Titles under unregistered wills as against heirs. 1277. Where a will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him, shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law (*s*). But *quære* whether this is not now controlled as to Yorkshire by ss. 14 and 17 of the Act of 1884.

Contemporaneous registrations in Middlesex. 1278. Under the provision of the Middlesex Registration Act (*t*), documents which are shown by the entries to have been registered on the same day, and at the same hour, will be assumed to have been duly entered in the order in which they were received

(*m*) Yorkshire Registry Act, 1884, s. 7. Before this Act the law in Yorkshire was *aliter*, *Kettlewell v. Watson*, 21 Ch. D. 685.

(*n*) *Rodger v. Harrison*, [1893] 1 Q. B. 161.

(*o*) *Scrafton v. Quincey*, 2 Ves. Sen. 413.

(*p*) *Ball v. Lord Riversdale*, Beat. 550.

(*q*) *Re Cooper, Cooper v. Vesey*, 20 Ch. D. 611.

(*r*) *Jack v. Armstrong*, 1 Huds. & Bro. 727.

(*s*) Vendor and Purchaser Act, 1874, c. 78, s. 8.

(*t*) 7 Anne, c. 20, s. 6.

by the registrar, as indicated by the numbers attached to them respectively (*u*), and will be entitled to priority accordingly. Paragraphs
1278—1283

1279. By s. 3 of the Yorkshire Act of 1885, a person claiming any interest in any lands may enter a caveat on the registry in favour of any other person for a specified period, the effect of which is that any assurance (*ex. gr.* a mortgage) made by the person by whom the caveat was given in favour of the person in whose favour such caveat was given, is to have priority as though it had been registered upon the date when the caveat was entered. The object of this useful provision was, of course, to prevent the possibility of a new registration being made pending the completion of formal assurances. System of
caveats in
Yorkshire.

1280. The provisions of 18 & 19 Vict. c. 15 s. 12, for the registration of annuities and rent-charges are construed in the same manner as to the effect of notice as the Registry Acts; and annuities, although unregistered, may be valid as against subsequent incumbrancers who took with notice, and against the trustee in bankruptcy of the grantor (*x*). Registration
of rent-
charges and
annuities
have same
effect as
registration
of land in
Middlesex.

1281. The Land Transfer Act, 1875 (54), provides that, subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created (*y*). Registration
under Land
Transfer Acts.

1282. A like provision is contained in the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), s. 49. Irish Land
Transfer Act.

SECTION II.

Of the Priorities of Registered Bills of Sale.

Bills of sale take priority in order of registration PARAGRAPH
1283

1283. The 10th section of the Bills of Sale Act, 1878, provides that in case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels. Consequently, the holder of a subsequent registered bill of sale by taking possession of the goods does not oust the holder of an earlier registered bill (*z*). Although this language appears to be applicable only to questions of priority between earlier and later registered bills of sale, it is held to be also the general intention of the Act that registered bills of sale shall take precedence of such Bills of sale
take priority
in order of
registration.

(*u*) *Neve v. Pennell*, 2 H. & M. 170.

(*x*) *Greaves v. Tofield*, 14 Ch. D. 563.

(*y*) 38 & 39 Vict. c. 87, s. 28.

(*z*) *Exp. Allen, Re Middleton*, L. R. 11 Eq. 209.

Paragraphs 1283—1286 as are *unregistered*, so far as the latter have any force (*a*). And an unregistered bill of sale will be void as against an execution creditor, though the latter had notice of it when his debt was contracted (*b*). It will also be borne in mind that under the Act of 1882 all unregistered bills of sale given by way of security for money are *ipso facto* void (104).

The priorities which result from the various other provisions of the Bills of Sale Acts are considered in connection with the former observations upon the Acts (77—123).

SECTION III.

Priority under the Policies of Assurance Act.

	PARAGRAPH
<i>Dates of notice of assignments regulate priority</i>	1284
<i>Mere agreement to assign not within Act</i>	1285

Dates of notice of assignments regulate priority.

1284. By the Policies of Assurance Act, 1867 (c. 144), s. 3, the date of the notice which the Act requires to be given to the assurance company in order to enable the assignee to sue upon the policy (150, 1234), regulates the priorities of all claims under any assignment; and payments *bona fide* made by the company before the receipt of the notice are as valid against the assignee giving the notice as if the Act had not passed.

Mere agreement to assign not within Act.

1285. A mere agreement to execute a mortgage of a policy, not being an assignment within the Act, notice of it to the company will not give priority over an earlier equitable mortgagee, who has given no notice (*c*).

SECTION IV.

Of Priority under the Merchant Shipping Act.

	PARAGRAPH
<i>Mortgages of ships have priority according to dates of registration</i> ..	1286
<i>Priorities of mortgages made under certificates of mortgage</i> ..	1287
<i>Tacking unregistered further charges</i>	1288
<i>How far mortgagee of ship considered to be "owner"</i>	1289
<i>Registered mortgages of ships protected on mortgagor's bankruptcy</i> ..	1290

Mortgages of ships have priority according to dates of registration.

1286. The Merchant Shipping Act, 1894 (134, 141), directs (*d*) that if there be more than one mortgage registered of the same ship or share therein, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority, one

(*a*) *Conelly v. Steer*, 7 Q. B. D. 520; *Lyons v. Tucker*, 7 Q. B. D. 523.

(*b*) *Edwards v. Edwards*, 2 Ch. D. 291.

(*c*) *Spencer v. Clarke*, 9 Ch. D. 137.

(*d*) Section 33.

over the other, according to the date at which each instrument is recorded in the register books, and not according to the date of each instrument itself. Paragraphs
1286—1289

But where the priorities depend, not upon the dates of the instruments, but upon equities wholly independent of the dates of the instruments, the section will not apply (*e*).

1287. The same Act contains the following directions (*f*), concerning the priority of securities made under the certificates of mortgage established by the Act (**138**). Priorities of
mortgages
made under
certificates of
mortgage.

Whenever the certificate specifies the places, and limits the time (not exceeding twelve months), within which the power of mortgaging is to be exercised, no mortgage, *bona fide* made to a mortgagee without notice, shall be impeached by reason of the bankruptcy or insolvency of the person by whom the power was given.

Every mortgage, which is registered on the certificate, shall have priority over all mortgages of the same ship, or share, created subsequently to the date of entry of the certificate in the register book; and if there be more mortgages than one endorsed on the certificate (**138**), the respective mortgagees shall, notwithstanding any express, implied or constructive notice, be entitled one before the other, according to the date at which a record of each instrument is endorsed on the certificate, and not according to the date of the instrument creating the mortgage.

And subject to these provisions, and to the rules laid down as to the exercise of the power given by the certificate, every mortgagee whose mortgage is registered on the certificate, has the same rights and powers, and is subject to the same liabilities, as he would have had, and been subject to, if his mortgage had been registered in the register book instead of on the certificate (*g*).

1288. It has been held that a registered mortgagee cannot tack an unregistered further charge against a third registered mortgage to other mortgagees, where the unregistered charge was not exclusively for the first mortgagee's benefit: in which case it must be treated as an independent security requiring registration. The court abstained from expressing an opinion as to the right to tack, if the further charge *had belonged exclusively to the first mortgagee* (*h*). Tacking
unregistered
further
charge.

1289. The provision (*i*) that the mortgagee shall not by reason of the mortgage be deemed to be the owner of the ship, except so far as may be necessary for making it available as a security, makes the registered mortgagee the owner, so far as is necessary for that How far
mortgagee
of ship
considered to
be "owner."

(*e*) See *The Benwell Tower*, 8 Asp. M. C. 13; and see also *The Celtic King*, [1894] P. 175, where such equities were recognized, discussed in *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade*, [1905] 1 K. B. 815.

(*f*) Section 43.

(*g*) Section 43 (4), (5), (6).

(*h*) *Parr v. Applebee*, 7 De G. M. & G. 585.

(*i*) Section 34.

Paragraphs purpose; and therefore protects him against a sale of the ship by
 1289—1291 an execution creditor (*k*).

Registered
 mortgagees
 of ships
 protected on
 mortgagor's
 bankruptcy.

1290. No registered mortgage of any ship or share therein shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage, notwithstanding such mortgagor, at the time of his becoming bankrupt, may have in his possession and disposition, and be the reputed owner of such ship or share thereof; and such mortgage shall be preferred to any right, claim or interest in such ship or any share thereof which may belong to the bankruptcy trustee of such bankrupt (*l*).

SECTION V.

Of Priority under the Judgment Acts.

	PARAGRAPH
<i>Priorities of judgment creditors determined by dates of delivery to sheriff of writs</i>	1291
<i>Judgment creditors can only claim subject to every liability of debtor</i> ..	1292
<i>Priority of Crown debts</i>	1293
<i>Securities made to defeat judgments are postponed to them</i>	1294
<i>Irish judgment creditors</i>	1295
<i>Rule that judgment creditors take subject to prior equities applies to chattels</i>	1296
<i>Judgment creditor not a purchaser within 27 Eliz. c. 4</i>	1297
<i>Judgment creditor of heir no priority over creditors of ancestor</i>	1298
<i>Rights of judgment creditor against other creditors under deed of arrangement</i>	1299
<i>Judgment creditor under Sequestration Act</i>	1300
<i>Judgment creditor has no charge after return of writ</i>	1301
<i>Surplus of sale moneys in hands of judgment creditor</i>	1302
<i>Judgments liable to be registered in county registers</i>	1303
<i>Doctrine of notice no application between judgment creditors</i>	1304
<i>Executor of debtor may prefer one judgment creditor</i>	1305
<i>Judgments must be registered during debtor's lifetime</i>	1306
<i>Contemporaneous judgment and decree for general administration</i> ..	1307
<i>Judgment obtained by creditor pending administration suit</i>	1308
<i>Foreign judgment</i>	1309
<i>Sheriff with two writs in possession</i>	1310
<i>Priority of mortgagee under personal judgment against debtor</i>	1311

Priorities of
 judgment
 creditors
 determined
 by dates of
 delivery to
 sheriff of
 writs.

1291. Judgments affect the property of the debtor from the time when the sheriff has made his return to the registered writ of execution; and the priorities of judgment creditors are determined by the priority of the date at which their respective writs of execution were delivered to the sheriff (*m*). The sheriff's return to the writ amounts to delivery in execution (*n*).

(*k*) *Dickinson v. Kitchen*; *Kitchen v. Irving*, 8 El. & Bl. 789.

(*l*) Section 36.

(*m*) 27 & 28 Vict. c. 112, ss. 1, 3; *Guest v. Cowbridge Rail. Co.*, L. R. 6 Eq. 619.

(*n*) *Champerns v. Burland*, 23 L. T. (N.S.) 584.

1292. The interest of the judgment creditor, (whether he be with or without notice), in the property of his debtor is subject to every liability under which the debtor held it. If the debtor have a legal estate subject to an equity, the judgment will be a charge upon the estate, subject to the same equity; and in an equitable estate, the judgment will affect the equitable interest (o). A judgment creditor has therefore no priority by force of his judgment over persons who have prior equitable interests in the same estate (p); whether he claim (in an ordinary case of trust) against the estate of the *cestui que trust* (q), or against such an equitable interest, as that of a purchaser for value who has paid his purchase money without getting a conveyance (r). Nor can he, by giving notice to the trustee of a fund, put himself in any better position than the judgment debtor, and therefore cannot thereby gain priority over mortgagees of the latter, who have omitted to give notice of their charges to the trustee (s). As to cases of the latter class, the rule was early laid down (t), that if A. take a mortgage by a defective conveyance, and B. lend money to the mortgagor on bond, and obtain judgment on the bond, against the mortgagor, and so extend the land, a Court of Equity will relieve A. against the judgment creditor. And speaking of such a case (where the land had descended), Lord *Nottingham* says (u), “I decreed the heir to make a conveyance to the mortgagee, according to his father’s covenant for further assurance, and that he should hold till redemption, discharged of those judgments; wherein I did not rely upon the legal notice of *lis pendens*, but held the heir in this case to be a trustee of the land descended, which was charged with the equity of the mortgage, but could not be encumbered by the heir; for a purchaser without notice of a trust may be free, but an incumbrance is not like a sale.”

Paragraph
1292

Judgment
creditors
can only
claim subject
to every
liability of
debtor.

And where a tenant for life and tenant in tail joined in conveying to trustees, in trust to sell and divide the purchase-money, it was held (x) that judgments entered up against the tenant for life after this conveyance, did not bind the estate; for that would have affected the son’s equitable right to the performance of the trusts of

(o) *Langton v. Horton*, 1 Hare, 549; *Hughes v. Williams*, 3 Mac. & G. 683; *Whitworth v. Gaugain*, 1 Ph. 728; *Abbott v. Stratten*, 3 Jo. & Lat. 603; *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332.

(p) *Whitworth v. Gaugain*, 3 Hare, at p. 427, (affirmed 1 Ph. 728); *Williams v. Craddock*, 4 Sim. 313; *Abbott v. Stratten*, 3 Jo. & Lat. 603; so with respect to incorporeal property as tolls. *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332.

(q) *Newlands v. Paynter*, 4 Myl. & Cr. 408.

(r) *Finch v. Earl of Winchelsea*, 1 P. Wms. 277.

(s) *Arden v. Arden*, 29 Ch. D. 702; and see *Badeley v. Consolidated Bank*, 38 Ch. D. 238.

(t) *Gilb. Forum Romanum*, 228.

(u) *Burgh v. Francis*, 3 Swans. 536, n.; and see *Prior v. Penpraze*, 4 Price, 99.

(x) *Lodge v. Lyseley*, 4 Sim. 70.

Paragraphs the deed. And it was said, that from the time when a person, not
 1292—1294 having judgments against him, entered into binding contracts to sell his estates to purchasers, the latter had a right to have the legal estate conveyed; and if the vendor had subsequently confessed a judgment, that judgment never could have impeded the progress of the legal estate to them. The like doctrine prevails where the judgment creditor claims after an equitable charge for payment of debts, or any other equitable interests (*y*).

Priority of
Crown debts.

1293. Under the Crown Suits Act, 1865, and the Land Charges Act, 1900 (*z*), Crown debts do not affect land, as against *bona fide* purchasers for valuable consideration, or mortgagees with or without notice, unless a writ of execution has been issued and registered before the execution of the conveyance or mortgage to the purchaser or mortgagee; but this provision does not (*a*) take away or abridge any prerogative or right of the Crown in respect of priority or otherwise, over or against the *creditors* of any debtor or accountant to the Crown (*b*); and save as expressly provided in the part of the Act referred to, every prerogative or right of the Crown, as against the land or creditors of any debtor or accountant to the Crown, remains as if that part of the Act had not been enacted.

The Crown claiming under an extent is, however, like other judgment creditors, subject to prior equities and to such liabilities as the debtor has lawfully created (*c*); and it makes no difference if after the Crown debt has accrued, a new lease be taken in the name of the Crown debtor, because the new lease remains subject to the same equities (*d*) (**680**). But it was said that there would have been a difficulty if the legal estate had been in the Crown, against which there would then be no equity (*e*).

Securities
made to
defeat judg-
ments are
postponed
to them.

1294. The prior security will not prevail against the Crown, if it were made in favour of a person in whom it was a breach of duty to the Crown to take it; as where it was taken by a receiver-general from a person immediately responsible to him in respect of moneys

(*y*) *Whitworth v. Gaugain*, 3 Hare, 417, (affirmed 1 Ph. 728); and see *Brearclyff v. Dorrington*, 4 De G. & Sm. 122.

(*z*) 28 & 29 Vict. c. 104, ss. 48, 49; and 63 & 64 Vict. c. 26.

(*a*) Section 51 of 28 & 29 Vict. c. 104.

(*b*) See 13 Eliz. c. 4, and *Nicholls v. How*, 2 Vern. 389; see Co. Litt. 209, a, n. 1. But if on a sale under an extent, the purchaser obtain an order for payment of his purchase-money into the exchequer, and the money is invested with the consent of the Crown on the motion of the purchaser, and accumulated until it is more than enough to satisfy the Crown debt, the Crown not being liable in such a case to bear any loss, will not share in the surplus which remains after payment of principal, interest and costs. (*R. v. De la Motte*, 2 H. & N. 589.)

(*c*) *Casberd v. Att.-Gen.*, Dan. 238; *R. v. Humphery*, M'Clel. & Younge, 173; *R. v. Lee*, 6 Price, 369; *Giles v. Grover*, 6 Bligh (n.s.) 292.

(*d*) *Fector v. Philpott*, 12 Price 197.

(*e*) *Casberd v. Att.-Gen.*, *supra*; *Whitworth v. Gaugain*, 1 Ph. 728.

due to the Crown. And it seems that in such a case it would be the same if the mortgage were legal (*f*). Paragraphs
1294—1296

And so persons claiming under a writ of sequestration issued by the court, will have priority over a mortgagee who takes his security knowing that it was made to avoid the effect of the sequestration (*g*).

1295. The rule as to a judgment creditor taking subject to prior charges is applicable to the rights of a judgment creditor, who under the Irish Act, 13 & 14 Vict. c. 29 (**473**), has filed and registered an affidavit, by virtue of which he has the same remedies as if a conveyance subject to redemption had been made and registered, *i.e.*, according to the true construction of the Act, a mortgage of the debtor's remaining beneficial interest; and he obtains no additional priority by virtue of the peculiar terms of the Irish Registry Act (*h*) (**1266**). Irish
judgment
creditors.

1296. Where the equitable incumbrancer of chattels has completed his title by giving notice (**1226**), he also will have priority over the subsequent judgment creditor without notice, who has sued out his *fi. fa.*, just as in the case of real estate, he has priority over the *elegit*. It has therefore been held (*i*), that a judgment creditor had no right to take in execution a ship and cargo, as against prior equitable mortgagees (under a security made whilst the ship was at sea), who had sent notice of the assignment to the master, and had received immediate possession of the property from him upon the termination of the voyage. Rule that
judgment
creditors
take subject
to prior
equities
applies to
chattels.

But it has been intimated (*k*), that if the prior equitable title be incomplete, the claim of a subsequent judgment creditor, as well as that of a subsequent equitable purchaser, might prevail. A similar question has arisen in respect to a debtor's equitable interest in stock, leading to a difference of opinion between the Court of Chancery and the majority of the Court of Queen's Bench, which held (*l*) that a judgment creditor, who, having obtained a charging order upon stock, had given notice to the trustees of the stock, was entitled to priority over a previous mortgagee of the same stock, who had given no notice of his charge.

But upon the ground that the property from the time of the assignment, though without notice, is held in trust for the assignee as between him and the assignor, it is now considered that neither the assignor nor the trustee can resist the owner's claim, on the ground of want of notice; and that the compulsory charge intended

(*f*) *Broughton v. Davies*, 1 Price 216.

(*g*) *Ward v. Booth*, L. R. 14 Eq. 195; see *Empringham v. Short*, 3 Hare, 461.

(*h*) *Eyre v. M'Dowell*, 9 H. L. C. 619.

(*i*) *Langton v. Horton*, 1 Hare, 549.

(*k*) *Langton v. Horton*, 1 Hare, at p. 560.

(*l*) *Watts v. Porter*, 3 El. & Bl. 743; *per* Lord CAMPBELL, C.J., and WIGHTMAN and CROMPTON, JJ.

Paragraphs by the statute must be presumed to be a lawful charge, and there-
 1296—1297 fore a charge only upon such interest as the debtor really possessed (*m*).

It has been also observed, that the ground for giving a second mortgagee priority over the first, by reason of his having been led to take an incumbered as an unincumbered property, is not applicable to a judgment creditor; who has not been deceived as to the condition of the title, and as to whom the judgment debtor has been guilty of no deceit in suffering judgment.

A judgment creditor, therefore, cannot gain priority by virtue of a charging order, (whether *nisi* or absolute), over the equitable mortgagee of a chose in action who has given no notice, whether the mortgage were earlier or later than the judgment, but before the charging order; not only because the creditor gets nothing but what the debtor can dispose of, but because before the date of the order the debtor has ceased to be the sole owner of the fund (*n*).

The order *nisi* operates as a charge, (subject to cause being shown against making it absolute), and it cannot be defeated by any subsequent proceeding. The priority of a creditor who has obtained judgment against the executor of his debtor, and a charging order *nisi*, will therefore not be affected by a decree for the administration of the debtor's estate before the charging order was made absolute (*o*). And as a charging order has no greater effect than a charge executed by the judgment debtor (484), a charging order on a judgment by default for a debt which was incapable of being enforced will be inoperative (*p*).

Judgment
 creditor not
 a purchaser
 within
 27 Eliz. c. 4.

1297. A judgment creditor is not a purchaser within the Act 27 Eliz. c. 4, (426), for avoiding fraudulent conveyances against subsequent purchasers, and he has therefore no priority over a voluntary settlement of earlier date than his judgment (*q*). For under the old law the judgment creditor has no right to the land, having neither *jus in re*, nor *jus ad rem* (*r*); and under the Judgments Act, 1838 (*s*), he has only a charge upon the property or interest which remains in the debtor, whose right to defeat the voluntary deed, by a conveyance for valuable consideration, is not a disposing power within the Act; the words "disposing power" being there construed in their ordinary meaning.

(*m*) See *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507; and see the judgment of ROMILLY, M.R., in *Kinderley v. Jervis*, 2 Jur. (N.S.) 603; *Brearclyff v. Dorrington*, 4 De G. & Sm. 122; *Dunster v. Lord Glengall*, 3 Ir. Ch. R. 47; *Benham v. Keane*, 1 Johns & H. 685; *Pickering v. Ilfracombe Rail. Co.*, L. R. 3 C. P. 235; *Robinson v. Nesbitt*, L. R. 3 C. P. 264; *Re Bell, Carter v. Stadden*, 54 L. T. 370.

(*n*) *Scott v. Lord Hastings*, 4 K. & J. 633; *Warburton v. Hill*, Kay, 470.

(*o*) *Haly v. Barry*, L. R. 3 Ch. 452.

(*p*) *Re Onslow's Trusts*, L. R. 20 Eq. 677.

(*q*) *Beavan v. Earl of Oxford*, *supra*; *Dolphin v. Alyward*, L. R. 4 H. L. 486.

(*r*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491.

(*s*) See 1 & 2 Viet. c. 110, ss. 11, 13.

1298. Neither has the judgment creditor of the heir, (whether his judgment were entered up before or after the death of the ancestor), priority in respect of the descended estate over the simple contract debts of the ancestor; because the judgment operates only upon the beneficial interest of the heir, which is subject to the payment of the ancestor's debts (*t*). The like rule, of course, applies to the judgment creditor of the devisee and the creditors of the devisor. The judgment creditor also is not considered as a purchaser by virtue of the 13th section of the Act of 1838 (*u*), which gives him the remedies of an equitable mortgagee.

Paragraphs
1298—1301

Judgment creditor of heir no priority over creditors of ancestor.

1299. A judgment creditor, whose title has been completed after the date but before the execution by any of the creditors, of a deed of trust for creditors, will have priority over creditors by whom it is subsequently executed (*x*).

Rights of judgment creditor against other creditors under deed of arrangement.

1300. The stipend of the curate of a benefice under sequestration appointed by the bishop under the Sequestration Act, 1871, has priority over all sums payable by virtue of the judgment or bankruptcy under which the sequestration issues, but not over liabilities in respect of charges on the benefice (*y*). And the judgment creditor will not rank before incumbrancers earlier in date than the sequestration, but will be postponed to a security affecting the benefice, and obtained between the dates of the judgment and of the sequestration (*z*) (**1315**).

Judgment creditor under Sequestration Act.

The creditor who first lodges the writ of *levari facias* is entitled to the sequestration; and the order of sequestration, where there are several writs, is according to the order of the delivery of the writs (*a*).

1301. A judgment creditor who has taken out execution, loses his priority on the return of the writ over so much of the estate as is not sold under the execution, because the writ has no more effect after its return; and the creditor's right to sue out another writ does not continue to him his former priority (*b*).

Judgment creditor has no charge after return of writ.

(*t*) *Kinderley v. Jarvis*, 22 Beav. 1; see 3 & 4 Will. 4, c. 104. But lands *bond fide* aliened (though only by deposit of deeds) by the heir before action brought are not liable, by the statute of fraudulent devises (3 Will. & M. c. 14, s. 5) to execution by the creditors of the ancestor, the heir only being bound. (*Spackman v. Timbrell*, 8 Sim. 253; *Richardson v. Horton*, 7 Beav. 112; *Exp. Baine*, 1 Mont. D. & De G. 492.) The equitable mortgagee of the devisee, whether by actual conveyance or by deposit of deeds with a memorandum, will have priority over simple contract debts of the devisor, in respect of which judgment has not been obtained. (*British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567; *Re Moon*, *Holmes v. Holmes*, [1907] 2 Ch. 304); *Re Atkinson*, *Proctor v. Atkinson*, [1908] 2 Ch. 307.

(*u*) See 1 & 2 Vict. c. 110, ss. 11, 13.

(*x*) *Langhorne v. Harland*, 4 W. R. 696.

(*y*) 34 & 35 Vict. c. 45, s. 3.

(*z*) *Wise v. Beresford*, 3 Dru. & War. 276. It being not illegal in Ireland to make a specific charge on a benefice during the incumbent's life.

(*a*) *Sturgis v. Bishop of London*, 7 El & Bl. 542.

(*b*) *Williams v. Craddock*, 4 Sim. 313.

Paragraphs
1302—1304

Surplus of
sale moneys
in hands of
judgment
creditor.

Judgments
liable to be
registered
in county
registers.

Doctrine of
notice no
application
between
judgment
creditors.

1302. Where a judgment creditor received more than the sum for which judgment was entered up, a court of law ordered (c) satisfaction to be entered up, as of the date on which a later judgment was entered up, and directed sums received by the first judgment creditor, since that time, to be paid to the second judgment creditor; but not any of the sums received prior to the signing of the second judgment.

1303. Before 27 & 28 Vict. c. 112, the necessity for the registration of judgments under the Middlesex and other Acts (d), was not affected by 1 & 2 Vict. c. 110, s. 13, and 2 & 3 Vict. c. 11, s. 2, under which judgments became charges when registered in the Common Pleas. The construction of the statutes was, that judgments upon lands in the register counties bound, when registered in the Common Pleas, from the time of registration under the register Acts (e). Hence a mortgage of a term of years, registered in a county registry before the issuing of *elegit* upon a judgment registered earlier but only in the Common Pleas (f), prevailed over the judgment; and a judgment registered both in the Common Pleas, and in the county, was preferred to one which was registered earlier in the Common Pleas, but later in the county (g). These decisions are, however, now obsolete by reason of 27 & 28 Vict. c. 112, s. 1, under which judgments do not affect lands in any way until actually delivered in execution (468). And by 63 & 64 Vict. c. 26, s. 4, the *Middlesex* Registry Act, 1708, is no longer applicable to any writ or order of execution, or any instrument capable of being registered under that Act or the Land Charges Registration and Searches Act, 1888.

1304. The doctrine of notice never affected the priorities between judgment creditors. Apart from the registry Acts, equity would not, on the ground of notice, assist a prior judgment creditor to take from one of later date, the fruit of his diligence in first obtaining execution at law. And the judgment creditor is not a purchaser or mortgagee within the registry Acts; nor a mortgagee for this purpose under 1 & 2 Vict. c. 110. Neither is the position of a subsequent judgment creditor, who claims under a legal title, and generally *in invitum*, like that of a subsequent purchaser or mortgagee, whose title being equitable only cannot (as it would if taken

(c) *Cottle v. Warrington*, 5 B. & Ad. 447.

(d) *Middlesex*, 7 Anne, c. 20, s. 18; *East Riding*, 6 Anne, c. 35, s. 19; *North Riding*, 8 Geo. 2, c. 6, s. 18.

(e) *Westbrook v. Blythe*, 3 El. & Bl. 737; *Johnson v. Holdsworth*, 1 Sim. (n.s.) 106; *Benham v. Keane*, 1 Johns. & H. 685.

(f) *Westbrook v. Blythe*, *supra*.

(g) *Hughes v. Lumley*, 4 El. & Bl. 274; *Neve v. Flood*, 33 Beav. 666.

with notice) be used contrary to equity. The priority gained by the earlier county registration of a subsequent judgment was therefore held good, though the creditor entered it up with notice of an earlier judgment (*h*). But these questions appear to be now merely of historic interest.

Paragraphs
1304—1307

1305. In the administration of assets between one judgment against the testator and another, priority of time is not material. The first execution will be preferred, and before execution the executor may pay first whom he will (*i*).

Executor of
debtor may
prefer one
judgment
creditor.

1306. Under 23 & 24 Vict. c. 38, s. 3, a judgment, in the administration of the assets of the testator or intestate against whom it was recovered, has no priority over, but ranks as, a simple contract debt, unless duly registered, so as to bind lands, at the time of the passing of the Act, or afterwards during the life of the judgment debtor (*k*). But the statute did not affect the old law that judgment (*l*) against the personal representative himself had priority, though not docketed, over the other debts of the testator. Therefore, unregistered judgments obtained before decree against executors or administrators still retain priority (*m*). And both they and decrees obtained by individual creditors for payment out of the assets of the testator, rank as between themselves according to date (*n*).

Judgments
must be
registered
during
debtor's
lifetime.

And the priority of judgments so obtained is not affected by the abolition of the distinction between speciality and simple contract debts in the administration of assets (*o*), or by s. 10 of the Judicature Act, 1875, which does not apply to judgment debts (*p*).

1307. Where a creditor obtains judgment against a legal personal representative, and on the same day a decree is made for the administration of the testator's estate, it is considered that the judgment and decree were obtained at the same moment, and the judgment creditor comes in *pari passu* with other creditors (*q*).

Contem-
poraneous
judgment
and decree
for general
administra-
tion.

(*h*) *Benham v. Keane*, *supra*. It was intimated that for this purpose a judgment would be treated as a contract, where it was given as a security under an express agreement to lend money. It will, however, be remembered that in contemplation of law all judgments are *in invitum* (186).

(*i*) *Wentworth*, Off. Executor, 269, ed. 14.

(*k*) *Re Turner, Waller v. Turner*, 10 Jur. (N.S.) 147; *Kemp v. Waddingham*, L. R. 1 Q. B. 355; *Van Gheulve v. Nerinckx*, 21 Ch. D. 189.

(*l*) See *Gaunt v. Taylor*, 3 Scott N. R. 700.

(*m*) *Jennings v. Rigby*, 33 Beav. 198.

(*n*) *Re Morrice v. Bank of England*, 3 Swans. 573; *Abbis v. Winter*, 3 Swans. 578, n.; *Dollond v. Johnson*, 2 Sm. & G. 301.

(*o*) 32 & 33 Vict. c. 46; *Re Williams' Estate*, L. R. 15 Eq. 270; *Re Stubbs' Estate*, *Hanson v. Stubbs*, 8 Ch. D. 154.

(*p*) *Smith v. Morgan*, 5 C. P. D. 337.

(*q*) *Parker v. Ringham*, 33 Beav. 535.

Paragraphs
1308—1311

Judgment
obtained by
creditor
pending
administra-
tion suit.

1308. Where the judgment has been obtained against the executors, pending an administration suit, the creditor will not be deprived of the fruit of his diligence, if there have been great and inexcusable delay in the conduct of the suit (*r*). An attachment in the Lord Mayor's Court against the assets of a deceased debtor does not, however, give any priority over the other creditors (*s*) ; nor does a judgment in the same court against a garnishee confer the rights of a judgment creditor in the administration of the garnishee's assets (*t*).

Foreign
judgment.

1309. Although a foreign judgment, not being a matter of record in England, will not bind land, or have priority there as a specialty (*u*), it may have priority in the administration of assets, against property sent by the executors from the country in which the judgment was recovered before the creditors there were satisfied ; because the assets must be administered as if they had remained in that country, and according to the order of priority there in force (*v*).

Sheriff with
two writs in
possession.

1310. If the sheriff be in possession under a writ of execution which becomes void on the bankruptcy of the debtor, and he is also in possession of a writ obtained by another creditor under a valid judgment, the latter will become the first writ, and will have priority over the assignees in the bankruptcy (*x*).

Priority of
mortgagee
under
personal
judgment
against
debtor.

1311. Creditors under a decree for sale in a foreclosure action formerly stood in the same rank with creditors by bond or covenant as to balances remaining due to them after the sale, and application of the proceeds of the estate (*y*) ; but as a personal judgment for payment may now be made in a foreclosure action the mortgagee may obtain the priority of a judgment creditor in respect of the balance.

(*r*) *Larkins v. Paxton*, 2 Beav. 219.

(*s*) *Redhead v. Welton*, 29 Beav. 521.

(*t*) *Holt v. Murray*, 1 Sim. 485.

(*u*) *Harris v. Saunders*, 4 B. & C. 411.

(*v*) *Cook v. Gregson*, 2 Drew 286.

(*x*) *Graham v. Witherby*, 7 Q. B. 491.

(*y*) *Wilson v. Lady Dunsany*, 18 Beav. 293.

SECTION VI.

Paragraph
1312**Of Priority under the Bankruptcy and other Acts.**

	PARAGRAPH
<i>Preferred debts in bankruptcy and winding up of companies</i>	1312
<i>Judgment creditors no priority in bankruptcy unless execution completed before receiving order</i>	1313
<i>Judgment creditor entitled to proceeds of execution if he had no notice of act of bankruptcy</i>	1314
<i>Under Sequestration of Benefices Act</i>	1315
<i>Priority of friendly societies against the estates of defaulting officers</i> ..	1316
<i>Priorities between mortgages of public works and public companies</i> ..	1317

1312. The general rule in bankruptcy and liquidation of companies (z) is, that the following debts are to be paid in priority to all other debts, but rank equally among themselves, and are payable in full subject to abatement in equal proportions, in case the property be insufficient to meet them, viz. :—

Preferred debts in Bankruptcy, and winding up of companies.

- (1.) All parochial or other local rates due at, and having become due and payable within twelve months next before the date of the receiving order or the commencement of the winding up, or the date of a compulsory order for winding up where no winding up has previously commenced; and all assessed taxes, land, property or income tax assessed up to April 5th next before the date of the receiving order or the commencement of the winding up; and not exceeding in the whole one year's assessment :
- (2.) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the company during four months before the date of the receiving order or the commencement, etc., of the winding up, not exceeding 50*l.*; and all wages of any labourer or workman not exceeding 25*l.*, whether for time or piece work, in respect of services to the bankrupt, or the company, during two months before the date of the receiving order or the commencement, etc., of the winding up : Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he has priority in respect of such sum or a part thereof as the court may decide to be due under the contract proportionate to the time of service up to the date of the receiving order or commencement, etc., of the winding up :

(z) 51 & 52 Vict. c. 62, s. 1 (Preferential Payments in Bankruptcy Act, 1888), and 8 Edw. 7, c. 69, s. 209.

Paragraphs
1312—1313

- (3.) All amounts, not exceeding £100 in any individual case, due in respect of compensation under the Workmen's Compensation Act, 1906 (a):

save as aforesaid, and subject to provisions as to partnerships, all debts provable shall be paid *pari passu*.

Except, therefore, where fraud is in question, the above are the only unsecured debts which enjoy priority in bankruptcy or winding up (b). They also enjoy, in general, priority over holders of debentures or debenture stock (c). For the cases on these Acts the reader is referred to writers on bankruptcy and the winding up of companies; other special cases are mentioned *infra*.

Judgment
creditors no
priority in
bankruptcy
unless
execution
completed
before
receiving
order.

1313. By s. 45 of the Bankruptcy Act, 1883, where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution (in the case of goods by seizure and sale, and in the case of land by seizure, or where the interest is equitable by the appointment of a receiver) or the attachment (by receipt of the debt), before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

By s. 46 (1.), where the goods of a debtor are taken in execution and before sale notice of a receiving order is served on the sheriff, the sheriff shall on request deliver the goods to the official receiver or trustee; but the costs of the execution shall be a charge on the goods, and the receiver or trustee may sell all or an adequate part of them to satisfy the charge.

(2.) Where the goods of a debtor are sold under an execution for more than 20*l.*, the sheriff shall deduct the cost of the execution from the proceeds of sale, and retain the balance for fourteen days; and if within that time notice is served on him of a bankruptcy petition having been served by or against the debtor, and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor; but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

(3.) An execution levied by seizure and sale on the goods of a

(a) In cases of bankruptcy, 6 Edw. 7, c. 58, s. 5 (3), and in cases of liquidation of companies, 8 Edw. 7, c. 69, s. 209.

(b) *Exp. Pottinger, Re Stewart*, 8 Ch. D. 621.

(c) 60 & 61 Vict. c. 19, now placed by s. 107 of the Companies Consolidation Act, 1908; as to the former law see *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212.

debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by a sheriff shall, in all cases, acquire a good title of them against the trustee in the bankruptcy. Under the corresponding section (87) of the Act of 1869, it was held that the trustee would be entitled to the proceeds of sale, although the bankruptcy petition was presented before the sale took place (*d*).

Paragraphs
1313—1316

1314. The execution creditor will be entitled to the proceeds of the sale if he had no notice of a prior act of bankruptcy, and no notice of a petition be given within fourteen days (*e*). But the seizure and sale prevent the execution creditor from issuing execution against the same debtor in respect of another debt, because he must necessarily do so with notice of the act of bankruptcy caused by himself by means of the first seizure and sale (*f*).

Judgment creditor entitled to proceeds of execution if he had no notice of act of bankruptcy.

1315. The stipends to be paid to curates appointed by the bishop to benefices under sequestration, have priority over all sums payable by virtue of the judgment or the bankruptcy under which the sequestration issues, but not over liabilities in respect of charges on the benefice (*g*) (**1300**).

Under Sequestration of Benefices Act.

1316. Upon the death, bankruptcy or insolvency (including liquidation by arrangement in England, *cessio bonorum* in Scotland, and petition for arrangement in Ireland) of any officer of a friendly society having in his possession by virtue of his office any money or property belonging to the society, or if any execution, attachment or other process be issued, or action or diligence raised against such officer or against his property, his heirs, executors or administrators, or trustee in bankruptcy or insolvency (including an assignee in Ireland and a judicial factor in Scotland), or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall upon demand in writing of the trustees of the society or any two of them, or any person authorized by the society or by the committee of management of the same to make such demand, pay such money and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer (*h*).

Priority of friendly societies against the estates of defaulting officers.

The institution of a suit is sufficient demand in writing; and the neglect of the trustees of the society to audit the accounts of the defaulting officer will not deprive the society of the statutory

(*d*) *Exp. Rayner*, L. R. 7 Ch. 325.

(*e*) *Exp. Villars, Re Rogers*, L. R. 9 Ch. 432.

(*f*) *Exp. Dawes, Re Husband*, L. R. 19 Eq. 438.

(*g*) The Sequestration Act, 1871, c. 45, s. 3.

(*h*) Friendly Societies Act, 1896. This applies although the officer shall, at the time of bankruptcy, etc., have ceased to hold office under the society. *Re Eilbeck*, [1910] 1 K. B. 136.

Paragraphs right of priority (*i*). But an incorporated banking company cannot
 1316—1317 be an officer of a society within the meaning of the Act, and will not be ordered to deliver up money which has been deposited with it in the character of treasurer (*k*).

Priorities
 between
 mortgagees of
 public works
 and public
 companies.

1317. The priorities of mortgagees of public works, and of the property of public companies, are frequently regulated, either by the special Acts of Parliament under which the undertakings are prosecuted, or by general Acts incorporated therein. The general tendency of these regulations is to give equal priority, irrespective of date, and a right to proportionate parts of the property comprised in the respective mortgages, according to the extent of the mortgagee's advances (*l*).

(*i*) *Absolum v. Gething*, 9 Jur. (N.S.) 1263, under corresponding provision of 18 & 19 Vict. c. 63, s. 23.

(*k*) *Re West of England and South Wales District Bank, Exp. Swansea Friendly Society*, 11 Ch. D. 768.

(*l*) Occasionally by the terms of a private Act the *interest* of later mortgagees may take priority over the *principal* secured by an earlier one. For an example of this, see *Usborne v. Limerick Market Trustees* (No. 2), [1900] 1 I. R. 85.

CANADIAN NOTES

PRIORITIES

THE policy of the registry laws is to secure to the holder a registered conveyance title as against the grantee under an unregistered deed of prior date (*a*).

The Registry Act, s. 29, c. 151, C. S. N. B. 1903, provides that all conveyances, etc., not registered as required by this chapter (subject to certain provisions) shall be fraudulent and void as against subsequent purchasers for valuable consideration when conveyances are subsequently registered; and see *The Mineral Products Company, et al, v. The Continental Trust Company* (1905), 37 N. B. R. 140, and 37 S. C. R. 517.

The registered instrument will not take priority over a prior equitable interest, if the party claiming under it has sufficient notice of the equitable interest (*b*).

Incumbrances which consist of taxes or rates assessed upon lands under the authority of the assessment Act (*c*) have priority over other incumbrances including mortgagees.

If lands are mortgaged to the Crown, the mortgage takes precedence to the lien for taxes, and the interest of the Crown cannot be sold for arrears of taxes (*d*). The lien for taxes takes precedence although the assessment be made after the creation of other charges and such a lien attaches in preference to a mortgage given before the Act was passed under the authority of which the assessment is made (*e*). Under s. 7 of the Mechanics and Wage Earners' Lien Act (*f*), the lien given to workmen

(*a*) *Fraser v. Mutchmor* (1904), 4 O. W. R. 290.

(*b*) *Rose v. Peterkin* (1887), 13 S. C. R. 677; *Winters v. McKinstry* (1902), 14 Man. L. R. 297; 23 Occ. N. 54.

(*c*) R. S. O. (1897), c. 224; the Municipal Act R. S. O. (1897), c. 223 and the Municipal Drainage Act R. S. O. (1897), c. 226.

(*d*) *Regina v. County of Wellington* (1889), 17 Ont. 615; 17 Ont. App. 421; sub nom. *Quirt v. Queen* (1891), 19 S. C. R. 510.

(*e*) *O'Brien v. Cogswell* (1890), 17 S. C. R. 420, and 21 N. S. R. 155; sub nom. *Cogswell v. Holland*.

(*f*) R. S. O. (1897), c. 153.

and others for work done and materials supplied shall have preference over a prior mortgage or other charge to the extent to which the selling value of the land is increased by the work done or the materials supplied (*g*). But a lienholder is not entitled to the benefit of insurance effected by the mortgagee, and if the buildings in respect of which the lien has been allowed are destroyed by fire the lien is at an end (*h*).

In order to preserve the lien which the Mechanics' Lien Act creates in favour of a contractor performing work on a house or other building for the owner, it is necessary to register the lien during the progress of the work, and as soon as the claim arises, or it may be postponed to a mortgage created subsequently, but without notice of the lien registered prior to such lien, and see *post*, 670*g* (*i*).

In *Craig v. M'Kay* (*k*) it was held that the plaintiff as assignee for the benefit of creditors occupied no higher position than his assignor and could not be regarded as a subsequent purchaser for valuable consideration within the meaning of the Registry Act so as to avail himself of its provisions with regard to the registration of the assignment before the mortgage.

As among those whose incumbrances are executions against the lands the rule of priority has been modified by the Creditors' Relief Act (*l*), and subject to its provisions moneys levied under executions shall be distributed rateably (*m*). But an execution creditor who directs the sheriff to stay proceedings may lose his priority over subsequent execution creditors in cases not provided for by the Creditors' Relief Act so long as the stay continues (*n*).

(*g*) *Dugton v. Horning* (1895), 26 Ont. 252.

(*h*) *Patrick v. Walbourne* (1896), 27 Ont. 221.

(*i*) *Richards v. Chamberlain* (1878), 25 Gr. 402; *Hynes v. Smith* (1879), 27 Gr. 150; *M'Vean v. Tiffin* (1885), 13 Ont. App. 1, overruling *Makins v. Robinson* (1884), 6 Ont. 1; *Reinhart v. Shutt* (1888), 15 Ont. 325; *Re Craig* (1883), 3 O. L. T. 501; *Wanty v. Robins* (1883), 15 Ont. 474; *Colonial Investment and Loan Co. v. M'Crimmon* (1905), 5 O. W. R. 315.

(*k*) (1906), 12 O. L. R. 121.

(*l*) R. S. O. (1897), c. 78, as amended by 62 Vict. (2) (1899), (Ont.), c. 11, s. 13.

(*m*) *Harvey v. M'Neil* 12 P. R. 362; 24 C. L. J. 122.

(*n*) *Foster v. Smith* (1856), 13 U. C. R. 243; *Bank of Montreal v. Munro* (1864), 23 U. C. R. 414; *Kerr v. Kinsey* (1865), 15 U. C. C. P. 531.

As between a mortgagee and an execution creditor of the mortgagor the rule of priority applies (*o*). The lien of an execution creditor against lands arises the moment a writ of execution against lands is delivered to the sheriff of the county or district within which the lands lie (*p*).

The Registry Act (*q*) provides for the registration of certain instruments affecting lands in the county or registry division in which the lands lie.

A mortgagee, legal or equitable, may lose his priority by failure to register, if a subsequent purchaser or mortgagee registers his instruments without actual notice of the prior mortgage. R. S. O. (1897), s. 97.

An action will lie against a registrar by any person suffering damage owing to the registrar's omission or wrongful act (*r*).

An instrument shall be deemed to be registered when received by the registrar or his clerk at his office during office hours (*s*).

An execution creditor who places his writ of execution in the sheriff's hands after the mortgage has been made, but prior to the registration thereof, does not thereby gain priority (*t*). Nor can an execution creditor obtain priority over the holder of a prior equitable claim which is unregistered or is not registered after the writ of execution has been placed in the sheriff's hands (*u*).

As to fraudulent preference, see *Wade v. Elliott* (1907), 11 O. W. R. 38.

For a decision as to priorities in contest between mortgagees,

(*o*) 62 Vict. (2) (1899), (Ont.) c. 11, s. 13.

(*p*) *Beekman v. Jarvis* (1847), 3 U. C. R. 280; *Converse v. Michie* (1865), 16 W. C. C. P. 167.

(*q*) R. S. O. (1897), c. 136.

(*r*) *Harrison v. Brega* (1861), 20 U. C. R. 324; *Green v. Ponton* (1885), 8 Ont. 471; *Brega v. Dickey* (1869), 16 Gr. 494; *Ontario Industrial Loan, etc., Co. v. Lindsey* (1884), 4 Ont. 473; *Morris v. Bentley* (1895), 2 Terr. L. R. 254.

(*s*) Registry Act R. S. O. (1897), c. 136, s. 96.

(*t*) *Russell v. Russell* (1881), 28 Gr. 419.

(*u*) *Hamilton Provident and Loan Society v. Gilbert* (1884), 6 Ont. 434; *Brown v. M'Lean* (1889), 18 Ont. 533; *Re Trusts Corporation and Boehmer* (1894), 26 Ont. 191; *Re Lewis and Thorne* (1887), 14 Ont. 133; *Bocz v. Spiller* (1905), 2 W. L. R. 280; *Imperial Elevator Company v. Jesse* (1907), 6 W. L. R. 381; and *ante*, p. 526m.

see *Waterous Engine Works v. Livingston* (1904), 3 O. W. R. 670; and see *Smith v. Hunt*, *ante*, p. 502*m*.

A purchaser of lands sold by a sheriff under an execution may gain priority by registration of his deed over a mortgage made before the sale but unregistered (*x*). Section 92 of the Registry Act (*y*) declares that registration shall constitute notice to all persons claiming any interest in the lands subsequent to such registration.

Registration of a mortgage on lands, before issue of the patent from the Crown, does not constitute notice to a person who afterwards obtains the patent without actual notice of the mortgage (*z*).

A mortgage prior as to execution and registration may be postponed to a mortgage made and registered subsequently. Thus where A. mortgages to B. land which he has agreed to purchase from C. but has not yet purchased, and after registration of the mortgage, A. receives a deed of the land from C. and gives a mortgage back to C. for the unpaid purchase money, in that case B.'s mortgage although prior in execution and registration is postponed to C.'s mortgage. B. under his mortgage takes no estate from A. as A. has none to give, or at most takes an estate by estoppel only to the extent of A.'s interest in the land which is that of owner of the equity of redemption; and the Registry Act does not apply (*a*).

Where a subsequent mortgagee advances money for the purpose of paying off a prior mortgage he is entitled to priority over an intervening incumbrancer (*b*). But he may be estopped by his conduct from asserting his rights (*c*).

If a person entitled to pay off a mortgage makes payments thereon from time to time he is not entitled to an assignment unless his payments have been made on the faith of his getting an assignment. In any event his right to an assignment is only

(*x*) *Van Wagner v. Findlay* (1867), 14 Gr. 53.

(*y*) R. S. O. (1897), c. 136.

(*z*) *Re Reed v. Wilson* (1893), 23 Ont. 552.

(*a*) *Nevitt v. M'Murray* (1886), 14 Ont. App. 126; *M'Millan v. Munro* (1898), 25 Ont. App. 288.

(*b*) *Trust and Loan Co. v. Gallagher* (1879), 8 P. R. 97.

(*c*) *M'Leod v. Wadland* (1894), 25 Ont. 118.

an equitable right and cannot prevail over the right of a second mortgagee who registers his mortgage without notice of the right (*d*).

Where a widow has not joined in the first mortgage to bar her dower, but joins in the second mortgage for that purpose, and the second mortgagee obtains priority over the first by prior registration, the widow is entitled to the surplus arising from a sale under the second mortgage in priority to the first mortgagee (*e*).

A mortgagee by deposit of title deeds or other person claiming an equitable lien, charge or interest may not be altogether defeated if he is in a position to institute an action to have his rights declared, for he may then register a certificate of *lis pendens* which will be notice to persons subsequently dealing with the lands (*f*).

Where one of two or more tenants in common has received more than his share, the other tenants in common cannot charge his share in priority to an execution creditor of the tenant in possession (*g*).

Where a first mortgagee released to the mortgagor portions of the mortgaged property on which there was a subsequent incumbrance it was held that this did not give priority to the subsequent incumbrancer with respect to the remainder of the property, but that it might render the first mortgagee responsible to the second for the fair value of the parcels released (*h*).

Where a lease made for a term less than seven years contains a covenant for renewal for a further term which together with the original term makes a period exceeding seven years, in that case, if the lessee is in possession, the lease does not require registration in order to be valid as against a mortgage of the land which was registered during the original term (*i*).

(*d*) *M'Millan v. M'Millan* (1894), 21 Ont. App. 343; *Imperial Loan and Investment Co. v. O'Sullivan* (1879), 8 P. R. 162; *Watson v. Dowser* (1881), 28 Gr. 478.

(*e*) *Gray v. Coughlin* (1891), 18 S. C. R. 553, reversing the Court of Appeal for Ontario; S. C. sub nom. *MacLennan v. Gray* (1889), 16 Ont. App. 224.

(*f*) R. S. O. (1897), c. 51, s. 97.

(*g*) *M'Pherson v. M'Pherson* (1883), 10 P. R. 140.

(*h*) *Trust and Loan Co. v. Boulton* (1871), 18 Gr. 234.

(*i*) *Latch v. Bright* (1869), 16 Gr. 653.

Where the lessee during the currency of a lease for five years obtained a lease for a further term of four years to commence on the termination of the first lease, it was held that the second lease being unregistered could not prevail against a mortgage registered after the second lease was made but before possession under it began. In order to obtain a protection of the statute there must not only be a present lease but possession under it (*k*).

Plaintiff owned lot 19 and defendant owned lot 20. Lots 19 and 20 were at one time owned by the same person who built a house partly on both lots. The plaintiff company brought an action for a declaration that the house belonged to it, and based its action on the fact that the original owner of the two lots had obtained a loan on lot 19 for the purpose of constructing the building in question, and that, being the owner of the two lots the plaintiff company was entitled to the whole building, claiming that the defendant who was the owner of lot 20 had constructive notice of the claim of the plaintiff company. Held, that under sub-ss. 3 and 4 of s. 43 of the Land Registry Act [R. S. B. C. (1897), c. 111], the defendant being a purchaser for valuable consideration and claiming under the registered owner of lot 20 was not in any way affected by any relation that might exist between the original owner of lots 19 and 20, and the plaintiff company in connection with said building having been erected with the proceeds of a loan obtained by the said original owner from the plaintiff company (*l*).

The defendant was owner in fee simple in possession of a farm, and being about to marry, the co-defendant desired to convey to him an undivided one-half share thereof, so that they might become tenants in common. She consulted a local unlicensed conveyancer, who prepared a conveyance to himself and a reconveyance to the two defendants as tenants in common. The conveyances were left with him for registration. He registered the conveyance to himself, but fraudulently omitted to register the reconveyance. The defendants continued in possession, but the conveyancer without their know-

(*k*) *Davidson v. M'Kay* (1867), 26 U. C. R. 306.

(*l*) *Canadian Birkbeck Co. v. Ryder* (1905), 12 B. C. R. 92.

ledge mortgaged their farm to the plaintiff, who brought action to enforce their mortgage. Held, that under the Registry Act [R. S. O. (1897), c. 136], the reconveyance was void against the plaintiffs, who had advanced their money without notice. Held, also, that the right of entry did not accrue until the mortgage was registered, and the Statute of Limitations [R. S. O. (1897), c. 133] was not a defence to the plaintiff's claim, the writ having been issued within the period of the limitation (m).

As to the priority of sale under power between a second mortgagee and a receiver with regard to surplus proceeds, see *Milloy v. McClive* (1905), 5 O. W. R. 799; and see *Federal Life Assurance Company v. Stinson*, *post*, p. 932l; and "Fixtures," *ante*, p. 356e.

In addition to the priority to which the holder of a mechanic's lien is entitled over prior mortgagees, he may acquire priority over subsequent mortgagees by prior registration of his lien. A mortgagee who takes his mortgage after the work or material is supplied, but without notice of the lien, and registered the mortgage before the lien is registered takes priority over the lienholder (n).

(m) Judgment of the Supreme Court of Canada, 36 S. C. R. 455, and the Court of Appeal for Ontario, 9 O. L. R. 105; 5 O. W. R. 123; discharged judgment of Sir John A. Boyd, C., at trial restored. *McVity v. Tranouth*, (C. R.) (1908), A. C. 1.

(n) *Patrick v. Walbourne* (1896), 27 O. R. 221; and see *ante*, 670b.

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THE LAW OF MORTGAGE AND OTHER SECURITIES



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